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# Nonbelievers

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## NONBELIEVERS

*Nelson Tebbe\**

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## INTRODUCTION

HOW should courts handle nonbelievers who bring religious freedom claims? Although this question is easy to grasp, it presents a genuine puzzle because the religion clauses of the Constitution, along with many contemporary statutes, protect only religion by their terms. From time to time, judges and scholars have therefore wondered whether or how nonbelieving Americans could benefit from free exercise protections or be subject to nonestablishment limitations.<sup>1</sup>

Recently, the legal predicament of nonbelievers has become more prominent because of the growing visibility of groups that reject religious ideas, identities, and institutions. Public awareness has increased in several ways. President Obama included them in his inaugural address when he said: "We are a nation of Christians and Muslims, Jews and Hindus, and nonbelievers."<sup>2</sup> Following the President's lead, Mayor Bloomberg invited atheist leaders to his annual interfaith prayer breakfast for the first time.<sup>3</sup> Meanwhile, writers known as the New Atheists were emerging into public consciousness with a series of bestselling books.<sup>4</sup> Perhaps emboldened by events like these, organizations of nonbelievers have

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<sup>1</sup> See, e.g., *Kaufman v. McCaughtry*, 419 F.3d 678, 681–80 (7th Cir. 2005) (addressing an atheist inmate's claim that an official's refusal to allow him to form a study group and receive certain publications violated the Free Exercise and Establishment Clauses); 1 Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* 147–53 (2006); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 326–28 (1996).

<sup>2</sup> Barack Obama, President of the United States, Inaugural Address (Jan. 20, 2009) (transcript available at <http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html>).

<sup>3</sup> Daniel E. Slotnik, *At Mayor's Breakfast, 'Interfaith' Means Atheists, Too*, Posting to City Room, N.Y. Times (Jan. 7, 2010, 10:02 A.M.), <http://cityroom.blogs.nytimes.com/2010/01/07/atheists-attend-mayors-interfaith-breakfast-for-the-first-time/> (connecting the invitation to Obama's inaugural address).

<sup>4</sup> See, e.g., Richard Dawkins, *The God Delusion* (2006); Daniel C. Dennett, *Breaking the Spell: Religion as a Natural Phenomenon* (2006); Sam Harris, *The End of Faith: Religion, Terror, and the Future of Reason* (2004); Christopher Hitchens, *God Is Not Great: How Religion Poisons Everything* (2007); Victor J. Stenger, *The New Atheism: Taking a Stand for Science and Reason* (2009). See generally Paul Horwitz, *The Agnostic Age* xiv (2011); Peter Berkowitz, *The New New Atheism*, Wall St. J., July 16, 2007, at A13.

grown progressively more active and vocal.<sup>5</sup> During last year's winter holidays, for example, atheist groups sponsored advertisements that displayed phrases such as "Good Without God" and "This Season, Celebrate Reason."<sup>6</sup> Disputes arising from such activities already have gone legal. For instance, freethinkers sued to erect winter solstice displays alongside traditional symbols such as crèches and menorahs.<sup>7</sup> Another group went to court to challenge the removal of a billboard that read "Imagine No Religion."<sup>8</sup>

Not only is social conflict involving nonbelievers more visible, but it may be taking on new qualities as well.<sup>9</sup> While atheists and agnostics have long comprised one of the most reviled minorities in America,<sup>10</sup> they now seem to be garnering antipathy of a different

<sup>5</sup> See, e.g., Laurie Goodstein, *More Atheists Shout It From the Rooftops*, N.Y. Times, Apr. 26, 2009, at A1 ("More than ever, America's atheists are linking up and speaking out . . ."); G. Jeffrey MacDonald, *Ranks of Atheists Grow, Get Organized*, The Christian Sci. Monitor, June 28, 2009, at 22. On campuses, the Secular Student Alliance reported that it had forty-two chapters in 2003 and 146 in 2009. *Atheism*, N.Y. Times (Apr. 27, 2009), <http://topics.nytimes.com/topics/reference/timestopics/subjects/a/atheism/index.html>.

<sup>6</sup> See James C. McKinley Jr., *For Atheist Ads on Buses, Equally Mobile Reaction*, N.Y. Times, Dec. 14, 2010, at A19 (reporting on atheist ad campaigns in various American cities, both during the holiday season and more generally); Daniel E. Slotnik, *For the Holidays, an Atheism Billboard*, Posting to City Room, N.Y. Times (Nov. 29, 2010, 8:00 A.M.), <http://cityroom.blogs.nytimes.com/2010/11/29/for-the-holidays-an-atheism-billboard/> (reporting on a sign posted by the American Atheists outside the Lincoln Tunnel: "You Know It's a Myth: This Season, Celebrate Reason!").

<sup>7</sup> See *Ark. Soc'y of Freethinkers v. Daniels*, No. 4:09CV00925SWW, 2009 WL 4884150, at \*1, \*6 (E.D. Ark. Dec. 16, 2009) (ruling in favor of freethinkers who wished to erect a winter solstice display). But see *Wells v. City and County of Denver*, 257 F.3d 1132, 1136–38, 1153 (10th Cir. 2001) (allowing a city to reject a winter solstice display under different facts). See also Debra Cassens Weiss, *Courthouse Holiday Display Includes 'Star Wars' Message and Atheist Contributions*, A.B.A. J., (Dec. 13, 2010), [http://www.abajournal.com/news/article/courthouse\\_holiday\\_display\\_includes\\_star\\_wars\\_character\\_and\\_atheist\\_contrib](http://www.abajournal.com/news/article/courthouse_holiday_display_includes_star_wars_character_and_atheist_contrib).

<sup>8</sup> Raja Abdulrahim, *Group Files Suit Against City Over Billboard Removal*, L.A. Times, Nov. 29, 2008, at B3; see also Brady Gillihan, *Atheist Group Wins Battle to Place Ads on City Buses*, Herald-Times (July 28, 2009), <http://www.heraldtimesonline.com/stories/2009/07/28/news.qp-8620169.sto>.

<sup>9</sup> See Laycock, *supra* note 1, at 327 ("The emergence of a vocal nontheistic minority in a predominantly theistic society causes serious social conflict.").

<sup>10</sup> See, e.g., Penny Edgell et al., *Atheists as "Other": Moral Boundaries and Cultural Membership in American Society*, 71 Am. Soc. Rev. 211, 217 (2006) ("Americans are less accepting of atheists than of any of the other groups we asked about, and by a wide margin."). Not only are nonbelievers less accepted than any other *religious* minority, including Muslims after 9/11, but they are the most disfavored minority of *any* type, at least according to this study. *Id.* at 217–18.

kind. Chiefly, that is because attitudes toward most other small sects have improved in recent years.<sup>11</sup> Social scientists have found that Americans increasingly understand themselves to share a sense of “spirituality,” however individualized or syncretistic, that is important for cultural and political membership.<sup>12</sup> Despite this increased religious tolerance, negative views of nonbelievers have persisted—and the result may be a growing acceptance gap. Nonbelievers are virtually the only Americans who dissent from this conception of common American religiosity, in other words, and they therefore may occupy a newly singular sort of outsider status. Even though discriminatory attitudes toward them are largely symbolic, many Americans nevertheless can have concrete effects on individual nonbelievers in settings like employment relations or child custody proceedings because they have never met someone who openly identifies as an atheist or agnostic.

Judges therefore will face the difficulty that I described at the outset, namely that religious freedom laws typically reference religion alone. That is true not only of constitutional provisions such as the Free Exercise, Establishment, and Test Oath Clauses, but also of relatively recent statutes, such as the powerful Religious Land Use and Institutionalized Persons Act (“RLUIPA”).<sup>13</sup> Virtually everywhere that American law protects free exercise and non-establishment it focuses on religion. Does our legal regime therefore exclude Americans who distance themselves from traditional religious beliefs and institutions, including atheists, agnostics, secular humanists, brights, and freethinkers? For example, should the American Humanist Association qualify for special protection from zoning laws on the same terms as traditional congregations? Could a local government display a sign declaring “Reason’s Greetings” during the holiday season?<sup>14</sup>

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<sup>11</sup> *Id.* at 213–15.

<sup>12</sup> For full support, see *infra* Section I.B.

<sup>13</sup> 42 U.S.C. §§ 2000cc–2000cc-5 (2006).

<sup>14</sup> Leading thinkers have devoted thoughtful sections of longer works to these questions. See Greenawalt, *supra* note 1, at 147–53; Laycock, *supra* note 1, at 326–37; see also Norman Dorsen, *The Religion Clauses and Nonbelievers*, 27 *Wm. & Mary L. Rev.* 863, 867–68 (1986) (providing a short but insightful treatment). A helpful working paper appreciates the growing salience of nonbelievers, but unlike this Article it asks what their prominence means for familiar establishments of religion. Caroline

In this Article, I argue that no wholesale solution is appropriate. Instead, courts should handle nonbelievers differently according to the different constellations of considerations that animate particular doctrines within religious freedom law. Multiple values count, and some of them cut against protecting nonbelievers in some contexts. Factual variations can make a difference as well. Only a polyvalent approach captures everything that should matter, from principled commitments to practical concerns.

Two arguments, however, oppose this piecemeal solution to the predicament of nonbelievers. Both come out of theoretical debates that are central to scholarship on religious freedom today. First, some have argued that the term religion should simply be defined to include (or exclude) nonbelievers, so that courts can determine whether to treat them like conventional practitioners in advance and for all purposes. Here, I argue that definitional approaches to the problem are not likely to be helpful. After testing leading definitions both in law and in another discipline—the academic study of religion—I conclude that they do little independent conceptual work. I do take from the religion literature a useful metadefinitional argument, however, namely that religion is a protean concept that courts may deploy with reference to their own institutional objectives. If that is right, then the effort to define religion is not so much wrong as incomplete: when courts ask whether something counts as religion in a particular doctrinal and factual context they are really asking whether it should be protected, which is a substantive matter. That inquiry is likely to yield variegated outcomes. Judges should avoid using definitions as shortcuts past meticulous doctrinal analysis.

A second argument is that religious believers should not enjoy special status in American law. On this view, there is no principled reason to protect religion differently from other beliefs that are deep and valuable. Even if nonbelief does not fall within the definition of religion, it should receive equivalent legal solicitude because religion cannot claim any distinctive legal standing.<sup>15</sup> My take is different. Whether religion is special as compared to nonbelief in

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Mala Corbin, *Nonbelievers and Government Speech*, 97 Iowa L. Rev. (forthcoming 2011) (on file with the Virginia Law Review Association).

<sup>15</sup> For sources, see *infra* Section II.C.

a particular area should depend on a range of considerations, including not only constitutional principles but also history, precedent, popular opinion, and practicality. Careful judges will neither always treat religion just like other cultural formations nor always distinguish it from them. Instead, they will sift through the rationales that drive individual provisions and decide whether those reasons justify treating nonbelievers similarly in specific scenarios. Ultimately, then, neither contemporary academic debate—over the definition of religion or over its specialness—offers much to courts confronting the problem of nonbelievers.

When it comes to doctrinal specifics, I propose solutions that both reflect and reveal the complexity of the relevant commitments. For example, I argue that while courts ought to presumptively prohibit government discrimination against nonbelievers,<sup>16</sup> they should not give every atheist institution extraordinary protection against state interference even though current law protects churches and synagogues in that way.<sup>17</sup> And while public schools cannot teach the truth of secular humanism or freethinking,<sup>18</sup> a progressive town conceivably could display an atheist slogan under some circumstances.<sup>19</sup> These outcomes are more particularized than those offered by others who have addressed the place of nonbelievers in the American scheme of religious freedom.

Part I describes the study's subject matter, which includes atheists, agnostics, secular humanists, and freethinkers.<sup>20</sup> It then argues, working from the social science literature, that nonbelievers face challenges to equal citizenship that have relevance for legal protection. Part II describes the polyvalent method that this Article adopts, and it goes on to reject the two arguments I have just outlined: that the term religion should be defined to include all nonbelievers and that, even if nonbelief does not count as religion, it should receive equivalent protection because religion is not special. Part III applies the polyvalent method to the problem of nonbe-

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<sup>16</sup> See *infra* Section III.A.

<sup>17</sup> See *infra* Section III.C.

<sup>18</sup> See *infra* Subsection III.D.1.

<sup>19</sup> See *infra* Subsection III.D.1.

<sup>20</sup> This is not a legal definition that carries real consequences but rather a description of the Article's topic. I acknowledge significant fuzziness at the margins of this category, but I focus on its core.

lievers across a variety of legal doctrines. Whether readers agree with its specific recommendations matters less than whether they are attracted to the general approach.

In the Conclusion, I point out an implication for a larger matter. If this Article's analysis is sensible—not necessarily convincing in every detail but reasonable overall—then it provides some reason to think that the endeavor of protecting religious freedom in a particularized way is not invariably meaningless or impossible, despite the fears of some influential thinkers.

### I. NONBELIEVERS

Nonbelievers occupy a precarious position in American society. Atheists, agnostics, and the like comprise a small segment of the population. Moreover, they continue to elicit aversion from the majority that is stronger than, and arguably different from, the distaste that is directed toward any other minority. At a time when Americans are, on some accounts, converging around tolerance for virtually all religious people, nonbelievers stand virtually alone. Their position in the social structure is therefore tenuous, though somewhat complicated, and it presents a risk of unequal citizenship. This Part pursues those claims.

#### A. *Who Are Nonbelievers?*

##### 1. *The Scope of the Study*

When I refer to nonbelievers here, I mean to include people who take negative or skeptical positions on the existence of superhuman beings and supernatural powers.<sup>21</sup> Atheists are commonly thought to deny the existence of a deity,<sup>22</sup> while agnostics are

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<sup>21</sup> Although it is possible to think of this as a definition of the term nonbelievers, it operates only to frame the problem. It carries no legal consequences, unlike the definitions of the term religion that I address below.

<sup>22</sup> See, e.g., Merriam-Webster's Encyclopedia of World Religions 87 (Wendy Doniger ed., 1999) (defining atheism as "[t]he critique and denial of belief in God"); 1 The Encyclopedia of Religion 479–80 (Mircea Eliade ed., 1987) (entry by George Alfred James) ("[A]theism is the doctrine that God does not exist, that belief in the existence of God is a false belief."); The HarperCollins Dictionary of Religion 88 (Jonathan Z. Smith ed., 1995) ("[A] critical stance towards divinity. . . . Modern naturalistic atheism . . . denies the existence of any superhuman beings, of any form of transcendent order or meaning in the universe.").



doubtful or think that there is no way of resolving the question on the available evidence.<sup>23</sup> Also included are most secular humanists,<sup>24</sup> freethinkers, and the like—to the degree that they take negative or skeptical positions on such issues.<sup>25</sup> There will be messiness at the edges of this group, but for this project I concentrate on its center.

Nonbelievers is a problematic term with no preferable alternatives. Taken literally, it might suggest that atheists or agnostics do not believe in anything at all. That erroneous connotation has driven some skeptics to invent a new term for themselves—“brights.”<sup>26</sup> Despite such difficulties, the term nonbelievers has gained social currency, exemplified by its appearance in President Obama’s inaugural address. Moreover, some influential religious skeptics do call themselves nonbelievers.<sup>27</sup> Finally, the obvious alternatives, like atheists or unbelievers, are either too specific or too pejorative. For all these reasons, I use the term despite its drawbacks.

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<sup>23</sup> See, e.g., Merriam-Webster, *supra* note 22, at 23 (defining agnosticism as “[t]he doctrine that humans cannot know the existence of anything beyond the phenomena of their experience” but also noting its association with “skepticism about religious questions” and opposition to Christian beliefs); HarperCollins, *supra* note 22, at 32 (“[T]he view that there is insufficient evidence to posit either the existence or non-existence of God.”). Others have defined these terms differently. Durkheim, for instance, thought of an atheist as someone who “does not concern himself with the question whether gods exist or not.” Emile Durkheim, *The Elementary Forms of the Religious Life: A Study in Religious Psychology* 31 (1915).

<sup>24</sup> HarperCollins, *supra* note 22, at 970 (defining secular humanism as “a term, often pejorative, used to describe the belief that ultimate values reside solely in the human individual and possess no supernatural origin or grounding,” and including organizations such as the Ethical Culture Society and the nontheistic wing of Unitarianism but also describing it as a “highly diffuse force in American culture”).

<sup>25</sup> Deists are thought to be different because they commonly “acknowledge[] the existence of a God upon the testimony of reason,” even though they reject “revealed religion.” Oxford English Dictionary (last visited Aug. 21, 2011), <http://www.oed.com/view/Entry/49206?redirectedFrom=deist#>. Understood this way, deism does not fall within my subject matter here.

<sup>26</sup> The term “bright” includes atheists, agnostics, and secular humanists. See Dennett, *supra* note 4, at 21; see also *The Brights’ Principles, The Vision, The Brights’ Net*, <http://www.the-brights.net/vision/principles.html> (last visited Mar. 3, 2011) (“A bright is an individual whose worldview is naturalistic (free from supernatural and mystical elements).”).

<sup>27</sup> See, e.g., Dawkins, *supra* note 4, at 15 (quoting Albert Einstein as saying “I am a deeply religious nonbeliever. This is a somewhat new kind of religion.”).

Several sorts of people are excluded from this study. First, I put to one side those who identify with a particular religious tradition but who care little about its fundamental doctrines, who have not given such matters much thought, or who would hesitate before committing to their tradition's beliefs or wholeheartedly engaging in its practices. Unenthusiastic, doubting, and even nonbelieving practitioners of recognized religions should be treated separately for analytic clarity. Part of the reason is that many doctrines of religious freedom apply without difficulty to, say, practicing Jews who nevertheless do not believe in God. Enough of the doctrine is based on the historical position and importance of familiar religious traditions that it easily includes doubters who nevertheless are meaningful members of those denominations. (Of course, if they brought claims as nonbelievers, rather than as members of their recognized faith traditions, they would be considered here.)

Neither do I include the growing numbers of syncretists and spiritualists who assemble their own notions and rituals in individualistic or idiosyncratic ways. Although they are unaffiliated with any recognized religion, they do incorporate elements of different faiths and they consider the result to be sacred or spiritual. These people are analytically distinct from nonbelievers, even though their creeds and observances may be highly nontraditional.<sup>28</sup>

Finally, I put to one side beliefs or actions grounded in morality or conscience, independent of any conception of God or the supernatural. Rather, I use the word *nonreligious* to refer to freestanding tenets. Avowed Lutherans, for example, may be pacifists for reasons of morality or conscience that are only weakly connected to their faith. Such people need not identify with a familiar religious tradition at all, but to the extent that they do they may see little connection between a particular practice and their religiosity. Nonreligious people present legal problems that are different from,

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<sup>28</sup> Is there any real difference between idiosyncratic spiritual people and nonbelievers? In practice, they may be difficult to separate out. I am interested here, however, in people who hold a noticeably skeptical attitude toward the existence of supernatural beings or forces and not in those who distance themselves from any recognizable religion but generally are happy to assent to the existence of otherworldly powers or persons.

and in some ways more complicated than, the ones I consider here.<sup>29</sup>

In short, I concentrate on committed nonbelievers and I ask how courts should evaluate their religious freedom claims.

## 2. *Demographics*

It is sometimes said that the number of Americans who have no religion has doubled in recent years, but this claim is misleading unless it is qualified in important ways. While it is true that about fourteen percent of Americans report that they have no religious affiliation, up from about seven percent in the early 1990s, many of these so-called “nones” also say that they believe in God and have a prayer practice.<sup>30</sup> When the question is asked in a more telling manner, the number of nonbelievers is small but not insignificant.

Few people asked about their beliefs report real incredulity. Between two percent and five percent of Americans say they do not believe in God,<sup>31</sup> while between three percent and six percent say that there is no way to know whether God exists.<sup>32</sup> When people are asked about their identity rather than their beliefs, the number of nonbelievers falls even further. Less than two percent call themselves atheists,<sup>33</sup> and less than three percent say they are agnostic.<sup>34</sup> Notwithstanding questions about whether these measures capture

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<sup>29</sup> For a leading treatment that includes the problem of nonreligious commitments of conscience and their relationship to religious ones for First Amendment purposes, see Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 *Yale L.J.* 1611, 1640–41 (1993).

<sup>30</sup> See Edgell et al., *supra* note 10, at 214; Michael Hout & Claude S. Fischer, *Why Americans Have No Religious Preference: Politics and Generation*, 67 *Am. Soc. Rev.* 165, 166–67, 173–75 (2002).

<sup>31</sup> Hout & Fischer, *supra* note 30, at 174 (2.9%, reporting on data from the 2000 General Social Survey); Barry A. Kosmin & Ariela Keysar, *American Religious Identification Survey: Summary Report: March 2009* at 8 (2009) [hereinafter ARIS] (2.3%); Pew Forum on Religion and Public Life, *U.S. Religious Landscape Survey, Religious Affiliation: Diverse and Dynamic* 162 (2008) [hereinafter Pew] (5%); Rodney Stark, *What Americans Really Believe: New Findings from the Baylor Surveys of Religion* 117 (2008) [hereinafter Baylor] (4%).

<sup>32</sup> See Hout & Fischer, *supra* note 30, at 174 (4.1%); ARIS, *supra* note 31, at 8 (4.3%); Baylor, *supra* note 31, at 62 (6%).

<sup>33</sup> See ARIS, *supra* note 31, at 5 (0.7% in 2008, up from 0.4% in 2001); Pew, *supra* note 31, at 5 (1.6%).

<sup>34</sup> ARIS, *supra* note 31, at 5 (0.9% in 2008, up from 0.5% in 2001); Pew, *supra* note 31, at 5 (2.4%).

the full range of religious skepticism, it seems clear that few Americans identify themselves as nonbelievers.<sup>35</sup>

Although the identification numbers are modest, they seem more significant when they are compared to current statistics for familiar religious groups. For example, Jews also comprise less than two percent of the population, as do Episcopalians.<sup>36</sup> Moreover, agnostics are about as numerous as Presbyterians.<sup>37</sup> If it is legitimate to combine those who identify as atheist and agnostic—something that is far from clear—then their numbers approach those of Lutherans or Pentacostals.<sup>38</sup>

Although few in number, nonbelievers are relatively privileged. Atheists and agnostics are more likely to be men than are members of the general population, and they are more likely to be white or Asian, at least according to one study.<sup>39</sup> Geographic distribution of atheists and agnostics is skewed toward the west and northeast.<sup>40</sup> A disproportionate percentage of them have college or graduate degrees as compared to the total population, although they are out-ranked in both categories by people who identify as Jewish or Hindu.<sup>41</sup> Nonbelievers also earn somewhat more than other Americans, though again not as much as self-identified Jews or Hindus.<sup>42</sup> Moreover, about ten percent of college professors are atheist and about thirteen percent are agnostic—numbers that are several times higher than those for Americans overall.<sup>43</sup> Professors at elite

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<sup>35</sup> Of course, some people may avoid the label atheist because of the social stigma that is often attached to it, even when they are answering confidential survey questions.

<sup>36</sup> ARIS, *supra* note 31, at 5 (Jewish: 1.2%; Episcopalian/Anglican: 1.1%); Pew, *supra* note 31, at 145 (Jewish: 1.7%; Episcopalian/Anglican Family: 1.5%).

<sup>37</sup> See ARIS, *supra* note 31, at 5 (Presbyterian: 2.1%); Pew, *supra* note 31, at 145 (Presbyterian Family: 2.7%).

<sup>38</sup> For example, Pew polled atheists and agnostics at 4%, while Lutherans and Pentecostals totaled 4.6% and 4.4%, respectively. Pew, *supra* note 31, at 5. But see ARIS, *supra* note 31, at 5 (atheists and agnostics totaling 1.6%, and Lutherans and Pentecostals/Charismatics totaling 3.8% and 3.5%, respectively).

<sup>39</sup> See Pew, *supra* note 31, at 63 (gender), 44 (race).

<sup>40</sup> See *id.* at 71.

<sup>41</sup> See *id.* at 56; see also The Ass'n of Religion Data Archives, [http://www.thearda.com/quickstats/qs\\_63.asp](http://www.thearda.com/quickstats/qs_63.asp) (reporting on the Baylor Religion Survey, Wave 2, 2007) (last visited Mar. 3, 2011).

<sup>42</sup> See Pew, *supra* note 31, at 60.

<sup>43</sup> Neil Gross & Solon Simmons, *The Religiosity of American College and University Professors*, 70 Soc. Religion 101, 113 (2009).

institutions are even more likely to be nonbelievers,<sup>44</sup> and biology professors express the highest rates of religious skepticism (perhaps not surprisingly).<sup>45</sup>

Overall, this empirical work presents a complex picture. On the one hand, nonbelievers comprise a fairly tiny minority. On the other hand, they are better educated and more affluent than many other Americans. In the next Section, I ask whether we should conclude that nonbelievers are meaningfully excluded from American society, and I show that, although the answer again is somewhat complex, there may well be reason to consider them disadvantaged, at least for certain legal purposes.

### *B. Are They Outsiders?*

What is the place of nonbelievers in contemporary American society? The answer may have legal significance. Most obviously, equal protection and nonestablishment doctrines are sometimes sensitive to the social location of minority groups and to the risk that they may be relegated to second-class status within the political community. The endorsement test, for example, asks whether religious government expression is likely to send a message of favor or disfavor to citizens.<sup>46</sup> Knowing whether atheists and agnostics are vulnerable to social subordination may be relevant to those sorts of constitutional determinations. This Section draws on studies of public perceptions, rather than the demographic data reported above.

Americans hold strong negative attitudes toward nonbelievers, though it is unclear whether and how they translate those attitudes into actual discriminatory actions. As a starting point, it is notable that people disfavor atheists and agnostics more than any other minority, religious or otherwise.<sup>47</sup> Respondents in one study said

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<sup>44</sup> Elaine Howard Ecklund & Christopher P. Scheitle, Religion Among Academic Scientists: Distinctions, Disciplines, and Demographics, 54 Soc. Probs. 289, 293, 296 (2007); Gross & Simmons, *supra* note 43, at 114.

<sup>45</sup> Ecklund & Scheitle, *supra* note 44, at 296.

<sup>46</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). For a scholarly approach to nonestablishment that resembles the endorsement test, see Christopher L. Eisgruber & Lawrence G. Sager, Religious Freedom and the Constitution 122–24 (2007).

<sup>47</sup> Edgell et al., *supra* note 10, at 217 (“Americans are less accepting of atheists than of any of the other groups we asked about, and by a wide margin.”).

that they were least likely to share a vision of society with atheists, and that they were less likely to approve of their children marrying an atheist than a member of any other marginalized group.<sup>48</sup> Most Americans would refuse to vote for an atheist for president.<sup>49</sup> Moreover, such attitudes are persistent: acceptance of atheists has not improved in recent decades.<sup>50</sup> While bias toward Muslims did intensify in the wake of the attacks of 9/11, rejection of atheists remained stronger, according to one team of researchers.<sup>51</sup> And while the same-sex marriage debate has highlighted discomfort around gay men and lesbians, it has not led to antipathy on the level of what atheists experience.<sup>52</sup>

These perceptions are somewhat more complex than they might seem at first, however, because nonbelievers are also seen to be elites. Courts have credited this perception<sup>53</sup> even though it probably outpaces the actual demographics that I described above.<sup>54</sup> Moreover, the perception of privilege is accompanied by moral critique. There is a sense that unbelief correlates with unwholesome behavior by members of the privileged classes, such as unbridled materialism and selfish individualism.<sup>55</sup> Attitudes toward religious skeptics are therefore intricate. In any event, one social fact remains uncontroverted: unbelief is not simply a private matter for Americans, but it is thought to have important public implications.<sup>56</sup>

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<sup>48</sup> Id. at 212, 218 (tbl.1). Responses to those two questions, concerning shared visions of America and marriage of children, are taken by the study's authors to be standard measures of public and private acceptance, respectively.

<sup>49</sup> Jeffrey M. Jones, *Some Americans Reluctant to Vote for Mormon, 72-Year-Old Presidential Candidates*, Gallup News Service (Feb. 20, 2007), <http://www.gallup.com/poll/26611/some-americans-reluctant-vote-mormon-72yearold-presidential-candidates.aspx#1>.

<sup>50</sup> Edgell et al., *supra* note 10, at 212; Jones, *supra* note 49 (reporting that fifty-three percent of respondents said they would not vote for an atheist for president in 2007, a number that was exactly the same in 1978).

<sup>51</sup> Edgell et al., *supra* note 10, at 230.

<sup>52</sup> Id.

<sup>53</sup> For example, one judge remarked: "[I]t appears to be generally realized that some of the world's foremost philosophers, scientists, and artists have been avowed atheists and that the increase in atheism has gone hand in hand with the spread of education." *Welsh v. Boy Scouts of Am.*, 742 F. Supp. 1413, 1434 app. C (N.D. Ill. 1990) (quoting P. Edwards, "Atheism," *The Encyclopedia of Philosophy* 174-75 (P. Edwards ed., 1967)).

<sup>54</sup> See *supra* Section I.A.

<sup>55</sup> Edgell, *supra* note 10, at 227-30.

<sup>56</sup> Id. at 229.

Antipathy toward nonbelievers is particularly interesting because few citizens identify as atheists or agnostics, and those who do largely keep their views quiet. Thirty-nine percent of atheists are uncomfortable discussing their beliefs, according to one report, and sixty-eight percent erect a Christmas tree each year.<sup>57</sup> So non-belief is not a visible characteristic for many individuals. Sociologists therefore describe majority sentiments toward nonbelievers as largely symbolic—though nevertheless important, both for society and for affected individuals.<sup>58</sup> Moreover, there is qualitative empirical evidence that nonbelievers themselves are aware of these attitudes and see themselves as an embattled minority.<sup>59</sup>

Although these findings come as a surprise to many, they are not new—Americans have long despised nonbelievers. More novel is that tolerance for other forms of religious divergence has grown in recent years.<sup>60</sup> Citizens today report an expanded sense of the varieties of religious practice, a willingness to build coalitions with other observant people, and even a recognition of commonality based on individual spirituality rather than denominational identification. Prejudice among religious groups has eased and, according to some social scientists, “the idea of a unified ‘Judeo-Christian’ tradition—once considered a radical myth—is now widely accepted by conservatives and liberals alike as a core aspect of American culture.”<sup>61</sup>

An ingredient of that common culture is a sacred orientation expressed through prayer.<sup>62</sup> Some degree of “spirituality” is seen to be a natural part of human life.<sup>63</sup> Specific belief systems may vary

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<sup>57</sup> Baylor, *supra* note 31, at 161, 163–65.

<sup>58</sup> Edgell et al., *supra* note 10, at 212 (“Americans’ views of atheists tell us little about atheists themselves.”); *id.* at 214, 230 (“[R]espondents were not, on the whole, referring to actual atheists they had encountered, but were responding to ‘the atheist’ as a boundary-marking cultural category.”).

<sup>59</sup> See Richard Cimino & Christopher Smith, *Secular Humanism and Atheism Beyond Progressive Secularism*, 68 Soc. Religion 407, 411 (2007) (noting that atheists and agnostics “have internalized . . . their minority status” and feel “embattled”).

<sup>60</sup> Edgell et al., *supra* note 10, at 214 (citing sources).

<sup>61</sup> *Id.* at 213.

<sup>62</sup> *Id.* at 213–14 (quoting Hout & Fischer, *supra* note 30).

<sup>63</sup> Increased numbers of people say they have no religion, and that they are not religious, but many of these people nevertheless describe themselves as “spiritual.” Hout & Fischer, *supra* note 30, at 176. For a depiction of American spirituality that is consonant with this shift, see Gary Laderman, *Sacred & Profane: ARIS Survey Gets ‘Re-*

greatly because they are assembled in ways that may be highly individual and idiosyncratic, drawing on a range of religious, contemplative, and philosophical traditions. Nevertheless, the search for sacredness itself is increasingly thought to be a universal aspect of being a moral person.<sup>64</sup>

This shift in American religiosity has had important implications for perceptions of political citizenship and cultural membership.<sup>65</sup> Neither the relaxation of religious prejudice nor the convergence of citizens around a set of shared beliefs and practices means that religion has ceased to form the basis for strong social and cultural identification.<sup>66</sup> On the contrary, those developments may help to explain why the few perceived dissenters from this scheme still draw powerful negative sentiments. Heightened religious diversity may actually have sharpened the importance of basic belief for social belonging and it may have increased antipathy to nonbelievers, who occupy an unusual position outside this conception of shared spirituality and morality.<sup>67</sup> If American religiosity is morphing in the ways these scholars suggest, then nonbelievers today occupy an unusual type of subordinate status—especially insofar as they are seen not as spiritual seekers themselves, but instead as people who reject the view that all good Americans have some sort of spiritual life.

On this view, the government sees naturalized religiosity or spirituality as a legitimate object of material and symbolic support. There has been a shift in the meaning of ideas like separation and the secular, so that both now are shaped by state support and recognition for individual seeking—despite or because of its impact on

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ligion', Misses Boat, available at [http://www.religiondispatches.org/archive/culture/1209/sacred%26profane\\_%3A\\_aris\\_survey\\_gets\\_%E2%80%98religion%E2%80%99\\_misses\\_boat/](http://www.religiondispatches.org/archive/culture/1209/sacred%26profane_%3A_aris_survey_gets_%E2%80%98religion%E2%80%99_misses_boat/).

<sup>64</sup> See Winnifred Fallers Sullivan, *We Are All Religious Now. Again.*, 76 Soc. Res. 1181, 1192–94 (2009) [hereinafter Sullivan, *Religious*].

<sup>65</sup> *Id.*; see also Edgell et al., *supra* note 10, at 212–14; Winnifred Fallers Sullivan, *Requiem for the Establishment Clause*, 25 Const. Comment. 309, 315–16 (2009) [hereinafter Sullivan, *Establishment Clause*].

<sup>66</sup> Edgell et al., *supra* note 10, at 230–31.

<sup>67</sup> *Id.* at 231 (“It is possible that the increasing tolerance for religious diversity may have heightened awareness of religion itself as a basis for solidarity in American life and sharpened the boundary between believers and nonbelievers in our collective imagination.”).



cultural citizenship and moral membership.<sup>68</sup> For example, “In God we trust” serves as the national motto.<sup>69</sup> Moreover, legislatures across the nation open with an official prayer, a practice that the Supreme Court has upheld as a rooted aspect of American tradition.<sup>70</sup> And, of course, the Court’s own sessions begin with the invocation “God save the United States and this Honorable Court.”<sup>71</sup> Public hospital chaplaincies now often perform “spiritual assessments” and provide guidance to anyone who wishes to receive it as part of an approach to overall health.<sup>72</sup> Patients can opt out, but the default assumption is that everyone shares the capacity for such a quest. President Obama has accepted or expanded government programs that may send similar messages, such as the White House’s faith-based initiative.<sup>73</sup> Official messages and programs like these apparently are not thought to be intolerably divisive.

In sum, condemnation of nonbelievers is pervasive and may well carry importance for public life. One plausible story about these attitudes is that citizens have come to define their shared sense of cultural and political membership against the imagined boundary figure of the atheist or agnostic. Do these perceptions have concrete consequences for nonbelievers that manifest in the actual behavior of others toward them? Unfortunately, I do not know of any reliable empirical work on that question. I suspect that a rigorous study would show *some* statistically significant effects. But even if those perceptions are largely symbolic, they can still have legal relevance.<sup>74</sup> After all, at least a few nonbelievers experience actual discrimination—we know this because their cases show up on court dockets. And when they do, Americans’ intense and widespread antipathy sometimes has relevance for individual litigation. So al-

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<sup>68</sup> Sullivan, Religious, *supra* note 64, at 1192; cf. Charles Taylor, *A Secular Age* 3 (2007) (making a historical argument that the term secular has come to describe a society in which belief is an individual choice among alternatives).

<sup>69</sup> 36 U.S.C. § 302 (2006).

<sup>70</sup> *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

<sup>71</sup> Supreme Court of the United States, The Court and Its Procedures, <http://www.supremecourt.gov/about/procedures.aspx> (last visited June 28, 2011).

<sup>72</sup> Sullivan, Establishment Clause, *supra* note 65, at 314–15.

<sup>73</sup> Sullivan, Religious, *supra* note 64, at 1191–92.

<sup>74</sup> See Horwitz, *supra* note 4, at xv–xvi (discussing the New Atheists and suggesting that in an “age of contestability” the fight between believers and nonbelievers is mostly discursive, but it is still important for law).

though I do not rely on it heavily below, nonbelievers' unique outsider status may impact legal analysis.

## II. THEORY

This Part concerns theory and method. Section A first describes the polyvalent approach. Although this short Section cannot defend this methodology in full, it begins the work of showing how it operates and why it is preferable to its competitors—particularly for addressing the problem of nonbelievers.

This Part then confronts two theoretical arguments that threaten to circumvent the detailed substantive analysis that this Article undertakes. Section B resists the temptation to say that nonbelievers are included within (or excluded from) the definition of religion for all purposes. Section C questions the argument that even if the term religion does not include atheists or agnostics, nonbelievers should be afforded similar solicitude because religious practitioners should not enjoy a special legal status. Both moves could settle specific doctrinal questions about nonbelievers at the outset, before a multidimensional analysis can get going. I maintain that definitional approaches are not likely to generate any conceptual yield independent of underlying questions surrounding whether protecting nonbelievers comports with the substantive principles driving one rule or another, and that whether religion is special as compared to nonbelief should be determined rule by rule, again taking into account all the commitments and considerations that count.

### *A. Method*

Using a polyvalent method, judges consider and apply a range of values that properly matter in religious freedom cases, including those brought by nonbelievers. Considerations include constitutional principles—such as liberty of conscience, government neutrality, substantive equality, and separation of church and state—as well as other concerns—such as American history and traditions, legal precedent, pragmatic workability, public opinion, and court legitimacy. Different doctrinal areas feature different mixes of these principled and pragmatic concerns, and different factual scenarios call for different applications of them to real problems. Con-

stitutional actors take into account all relevant values, at times prioritizing one over another, and they come to a reasoned, reflective conclusion. No algorithm or formula is available to direct the final decision, which counts as an opinion both in the sense that it is a pronouncement from an authoritative legal institution and also in the sense that it is the product of human assessment. Isolated judgments can, however, crystallize over time into site-specific rules or frameworks that do give guidance in subsequent cases.

This polyvalent method differs from approaches that feature a single value, rubric, or rule. Many prominent judges and academics bemoan the current state of the doctrine, which they reasonably consider to be convoluted or contradictory, and they try to impose order by proposing a concept that they think can capture virtually everything worth preserving in the case law while releasing aspects that are not. Leading examples of unitary theories include “equal liberty” and “substantive neutrality.”<sup>75</sup> Although these views have powerful appeal, they generally ignore or undervalue important factors. Part III will cash out this contention in several doctrinal domains, performing an analysis that would not work under a more focused model. While it is possible to give courts guidance in specific areas—and Part III will generate frameworks wherever feasible—overall decision making seldom can be reduced to a single standard without unacceptable cost. Scholars should stay open to the possibility that the complexity of existing precedent faithfully reflects the multifaceted nature of the American scheme of religious freedom.

Although it is, of course, not possible to fully defend this project here, it is feasible to show that it enjoys a respectable pedigree. Prominent academics have argued—and argued recently—that value monism works poorly in the area of religious freedom, and instead they have proposed varieties of pluralism.<sup>76</sup> Although my

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<sup>75</sup> See Eisgruber & Sager, *supra* note 46, at 51–77 (equal liberty); Douglas Laycock, Formal, Substantive and Disaggregated Neutrality Toward Religion, 39 *DePaul L. Rev.* 993, 1001–06 (1990) (substantive neutrality).

<sup>76</sup> See, e.g., 2 Kent Greenawalt, Religion and the Constitution: Establishment and Fairness 1–15 (2008); Steven H. Shiffrin, The Religious Left and Church-State Relations 9–60 (2009) [hereinafter Shiffrin, Relations] (describing and defending the “pluralistic foundations of the religion clauses”); Alan Brownstein, Why Conservatives, and Others, Have Trouble Supporting the Meaningful Enforcement of Free Exercise Rights, 33 *Harv. J.L. & Pub. Pol’y* 925, 929 (2010) (“[R]eligion is a multidimensional

analysis comes out differently from theirs in important places, as I show at several points in Part III, it shares their general theoretical orientation and is strengthened by their defenses of it. Moreover, I argue below that the most skilled monists do in fact consider a wide range of values when considering real-world scenarios—wider than their theories can comfortably admit.<sup>77</sup>

Courts likewise often work in a polyvalent way when deciding religious freedom cases. I take it to be relatively uncontroversial that judges actually do consider a wide range of concerns in this area—the fighting question today is not whether they are deploying polyvalent adjudication but instead whether they should be. Taking free exercise cases as an example, Justices have cited objectives as varied as avoiding burdens on religious practice,<sup>78</sup> ensuring neutrality toward religion,<sup>79</sup> respecting original meaning,<sup>80</sup> following precedent,<sup>81</sup> avoiding religious divisiveness and social conflict,<sup>82</sup>

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constitutional interest which subsumes and implicates several independently recognized constitutional principles.”); Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 *Cornell L. Rev.* 9, 41 (2004) [hereinafter Shiffrin, *Foundations*] (defending a similar thesis with respect to the Establishment Clause alone); Marc O. DeGirolami, *Tragic Historicism: A Theory of Religious Liberty* 3–6 (Jan. 22, 2010) (unpublished manuscript, on file with the Virginia Law Review Association). Some authors who recognize the indispensability of something like polyvalence, such as DeGirolami, also consider this situation regrettable or tragic. Cf. Horwitz, *supra* note 4, at xxv (noting the “tragic choices” that his position entails).

<sup>77</sup> See generally Nelson Tebbe, *Smith in Theory and Practice*, 32 *Cardozo L. Rev.* 2055, 2062–66 (2011) (arguing that several academic defenders of the unitary rule of *Smith* in fact are willing to compromise when considering actual cases in ways that their theories struggle to justify).

<sup>78</sup> *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (asking whether the disqualification of a claimant from employment benefits “imposes any burden” on religious practice).

<sup>79</sup> *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533–34 (1993).

<sup>80</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 901–02 (1989) (O’Connor, J., concurring in the judgment) (arguing that the First Amendment was enacted to protect religious minorities).

<sup>81</sup> *Id.* at 878–79 (“Our decisions reveal that [the reading of the Free Exercise Clause under which incidental burdens do not offend the First Amendment] is the correct one.”).

<sup>82</sup> *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment) (“[The religion clauses] seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.”).

maintaining consistency with other areas of constitutional law,<sup>83</sup> and preserving the rule of law.<sup>84</sup> If anything, Establishment Clause decisions are even richer.<sup>85</sup> Lower court opinions likewise reflect a multiplicity of concerns, perhaps even in places where the Supreme Court has mandated unitary standards.<sup>86</sup>

So while this polyvalent method is controversial, I believe that it is at least good enough for the project at hand. Objections are of course easy to anticipate. One will come from skeptics who doubt whether any coherent approach to religious freedom cases is possible. For them, polyvalent adjudication does not count as a method at all—it amounts to nothing more than ad hockery or the rudderless search for a *modus vivendi*.<sup>87</sup> Another might be that polyvalent adjudication makes it too easy for courts to smuggle in personal preferences. For now, I simply flag these objections and note that those who sympathize with them may not warm to the polyvalent method that I adopt and apply.

There are two theoretical positions that stand more directly in the way of this Article's argument, however. Both of them offer one-size solutions to the predicament of nonbelievers. I consider them in the next two Sections.

### B. Defining Religion

Because the Constitution and many statutes use the term religion to describe their subject, it is tempting to solve the puzzle by

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<sup>83</sup> *Smith*, 494 U.S. at 886 n.3 (citing equal protection cases); Nelson Tebbe & Robert L. Tsai, Constitutional Borrowing, 108 Mich. L. Rev. 459, 479–80 (2010) (describing the Court's explicit effort to align free exercise and equal protection law in *Smith*).

<sup>84</sup> *Smith*, 494 U.S. at 885 (warning against allowing each free exercise claimant to "become a law unto himself" (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878))).

<sup>85</sup> See, e.g., *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment) (arguing that no simple rule or test can adequately resolve difficult antiestablishment cases); Shiffrin, Foundations, *supra* note 76, at 41 (noting the many values that drive nonestablishment decisions).

<sup>86</sup> See, e.g., Tebbe, *supra* note 77 (speculating that the relatively unitary rule of *Smith* has made little difference in subsequent free exercise cases, which continue to reflect a multiplicity of principled and nonprincipled considerations).

<sup>87</sup> Cf. Winnifred Fallers Sullivan, The Impossibility of Religious Freedom 8 (2005); Steven D. Smith, Discourse in the Dusk: The Twilight of Religious Freedom?, 122 Harv. L. Rev. 1869, 1871 (2009) (reviewing 2 Kent Greenawalt, Religion and the Constitution: Establishment and Fairness (2009)).

saying that nonbelief either does or does not fall within one or another definition of that concept.<sup>88</sup> If atheism and agnosticism count as religions, the theory goes, then practitioners will be affected by the full range of religious freedom provisions, including both free exercise benefits and nonestablishment burdens. Although that definitional perspective has sometimes been adopted by courts, it is ultimately not too helpful. To see why, it is necessary to understand the best available attempts to define the term religion.

One tendency of courts and lawyers has been to look to the academic study of religion, an outside discipline that also has attempted to draw boundaries around the concept of religion. For example, the Supreme Court once relied on the scholar and theologian Paul Tillich for guidance.<sup>89</sup> Although that crossover makes some intuitive sense, I show below that the religion literature actually is of little use in law. On the other hand, I do find some helpful thinking there on the metaquestion of what it means to define the term religion. Turning next to the legal literature, I conclude that the definitional project, while not necessarily harmful, cannot substitute for an effort to answer the substantive question of whether nonbelievers should fall within one or another area of the doctrine. Definitional attempts to solve the problem of nonbelievers therefore obscure more than they clarify, and even the best of them incorporate substantive concerns that should be more openly addressed. An implication is that much of the current anxiety around the definition of religion is unwarranted.

### *1. Academic Study of Religion*

While there is no consensus among scholars of religion on how to define the term, it is fair to say that the main alternatives fall into three main camps—functionalist, critical, and substantive—and that the third attracts the most adherents. I will give a sense of each one before arguing that none is of substantial use in legal settings.

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<sup>88</sup> For an example of the former, see Laycock, *supra* note 1, at 326. For an example of a definition of religion that would result in the latter, see Greene, *supra* note 29, at 1640, 1642–43 (distinguishing religious claims from all secular claims of conscience in a way that includes atheist and agnostic claims).

<sup>89</sup> *United States v. Seeger*, 380 U.S. 163, 187 (1965).

First, religious beliefs and practices are sometimes associated with the power to delineate and unify communities and even whole societies. This way of thinking—often called functionalism<sup>90</sup>—goes back at least as far as Émile Durkheim. He argued that all “really religious beliefs” are held collectively, not individually, and they work to unite members of the group.<sup>91</sup> Later, functionalism took a linguistic turn in the important anthropological writing of Clifford Geertz.<sup>92</sup> Today, functionalists are sometimes taken to argue not only that all religion works to structure collectivities but further that all societies are religious in some way, since some sense of sacredness is necessary for social cohesion.<sup>93</sup> Unsurprisingly, this strong version is not popular among academic scholars of religion, but even weaker forms of functionalism find few adherents today.<sup>94</sup> That is largely because of a subsequent critique that proved to be highly effective.

Talal Asad led the reaction to functionalism. Drawing on post-modern and postcolonial theory as well as his knowledge of Islam and Christianity, Asad questioned the entire project of defining religion. “My argument,” he wrote, “is that there cannot be a universal definition of religion . . . .”<sup>95</sup> Two arguments for that conclusion

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<sup>90</sup> See, e.g., Martin Riesebrodt, *The Promise of Salvation: A Theory of Religion* 72 (2010) (“The primary distinction to be drawn in developing a theory of religion is that between a content-based and a formal or functional determination of the concept of religion. . . . Functional definitions explain the alleged contribution of religion to the constitution and reproduction of society.”).

<sup>91</sup> Durkheim, *supra* note 23, at 43. Durkheim described religion as “a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite into one single moral community . . . all those who adhere to them.” *Id.* at 47. Magical beliefs, by contrast to religious ones, do not serve to unify groups in Durkheim’s view. *Id.* at 44 (“[Magic] does not result in binding together those who adhere to it, nor in uniting them into a group leading a common life. *There is no Church of magic.*”).

<sup>92</sup> Clifford Geertz, *The Interpretation of Cultures* 90 (1973) (emphasizing the social utility of language). Other examples of works that stand within the functionalist line of thinking arguably include Pierre Bourdieu, *The Logic of Practice* 66–75 (1990) and Thomas Luckmann, *The Invisible Religion: The Problem of Religion in Modern Society* 51–56 (1967).

<sup>93</sup> Riesebrodt, *supra* note 90, at 74 (characterizing Luckmann’s theory this way).

<sup>94</sup> A possible exception is James Beckford, who advances a “social constructionist” conception of religion. James A. Beckford, *Social Theory & Religion* 3 (2003).

<sup>95</sup> Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* 29 (1993).

have been particularly influential.<sup>96</sup> First, Asad pointed out that functionalist definitions tended to center on individual belief or private inwardness.<sup>97</sup> That emphasis reflected an implicit orientation toward Protestant culture, and it worked poorly for traditions that seem indisputably religious—for example, Judaism or Islam—but that often feature practice and community more than belief and individuality.<sup>98</sup> Second, the very idea that religion is a distinct cultural form, set apart from other aspects of society like politics and economics, has its roots in “Western modernity” and cannot be disassociated with that provenance.<sup>99</sup> Moreover, the idea of religion’s distinctiveness reflects power differentials between the West and other contemporary societies, as well as within Western nations. Asad concluded that applying a universal definition to other cultures distorts them in ways that are politically problematic. He urged scholars to abandon the definitional effort and encouraged them instead to devote themselves to the study of particular traditions.<sup>100</sup>

A third approach, which has won substantial academic support, is substantive—it renews the effort to identify the content of the category of religion without lapsing into essentialism or Western bias. Defenders of substantive definitions hope to improve on func-

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<sup>96</sup> Bruce Lincoln, *Holy Terrors: Thinking About Religion After September 11*, at 1–2 (2003).

<sup>97</sup> Asad, *supra* note 95, at 45–47; *id.* at 47 (“Geertz’s treatment of religious belief, which lies at the core of his conception of religion, is a modern, privatized Christian one because and to the extent that it emphasizes the priority of belief as a state of mind rather than as constituting activity in the world.”).

<sup>98</sup> For examples of Asad’s influence even among his critics see, e.g., Lincoln, *supra* note 96, at 2 (endorsing Asad’s observation that the dominant definitions of religion have been historically specific); Riesebrodt, *supra* note 90, at 8 (“There is much in Asad’s critique that is noteworthy and justified. I absolutely share his opinion that religion is not a transhistorical phenomenon that is *sui generis* and inherent in the human species or that slumbers in human inwardness. I also agree with Asad’s view that in each case the institutionalization of religion must be analyzed in connection with a society’s political structures of power.”).

<sup>99</sup> Riesebrodt, *supra* note 90, at 8.

<sup>100</sup> This critical approach has influenced some interesting legal scholarship. For example, Winnifred Sullivan’s argument that meaningfully protecting religious freedom is impossible draws on the idea that the category of religion is culturally specific. Sullivan, *supra* note 87, at 3, 8. She concludes that “legal protection for religion is certainly theoretically incoherent and possibly unconstitutional.” *Id.* at 10. This kind of legal writing probably would not have taken the same form before Asad’s work and the critical wave of writing on religion that followed.



tionalist ones, which they feel were both over- and under-inclusive: too broad because they included community-forming practices that are not normally or profitably understood to be religious, such as sports, political movements, civic rituals, and the like, and too narrow because they excluded phenomena that were widely said to be religious but did not work to bind groups together, such as magical practices or divination.<sup>101</sup> Here is the leading substantive definition: "Religion is a system of communal beliefs and practices relative to superhuman beings."<sup>102</sup> A few features of this formulation are important to note. First, religion as such is distinguished from discrete traditions such as Buddhism, Islam, Judaism, or Christianity.<sup>103</sup> There are strains of Buddhism, for example, that make no reference to superhuman beings or powers, and they are simply not religious on this definition.<sup>104</sup> Second, substantivists often highlight practices and institutions as much as beliefs. Partly because they do not privilege belief, they claim that the project works tolerably well across all cultures, including traditions outside the modern West. Third, they sometimes claim that their definition derives from the

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<sup>101</sup> Riesebrodt, *supra* note 90, at xi (overinclusiveness); 74 (underinclusiveness); see also Asad, *supra* note 95, at 46 ("One consequence [of Geertz's approach] is that this view would in principle render any philosophy that performs such a [meaning-making] function into religion . . .").

<sup>102</sup> Merriam-Webster, *supra* note 22, at 915 (calling this "[a] definition that has received reasonable acceptance among scholars"); see also HarperCollins, *supra* note 22, at 893 (offering as an "[a]dequate" definition: "a system of beliefs and practices that are relative to superhuman beings").

Riesebrodt defines religion as "a complex of practices that are based on the premise of the existence of superhuman powers, whether personal or impersonal, that are generally invisible." Riesebrodt, *supra* note 90, at 74-75 (discussing and citing Melford E. Spiro, *Religion: Problems of Definition and Explanation*, in *Anthropological Approaches to the Study of Religion* 85, 96 (Michael Banton, ed., 1966)); see also Jonathan Z. Smith, *Religion, Religions, Religious*, in *Critical Terms for Religious Studies* 269, 281 (Mark C. Taylor, ed., 1998) [hereinafter Smith, *Religion*] ("The anthropological definition of religion that has gained widespread assent among scholars of religion . . . is that formulated by Melford E. Spiro, 'an institution consisting of culturally patterned interaction with culturally postulated superhuman beings.'" (citation omitted). Lincoln proposes a similar definition that nevertheless is "polythetic and flexible." Lincoln, *supra* note 96, at 5.

<sup>103</sup> Lincoln, *supra* note 96, at 8; Riesebrodt, *supra* note 90, at xii.

<sup>104</sup> Lincoln, *supra* note 96, at 111 n.16. Some with a substantive orientation respond that Buddhism as it is actually practiced does always include some conception of superhuman forces. Riesebrodt, *supra* note 90, at 78.

self-conception of religious practitioners themselves.<sup>105</sup> It can claim universal status because all societies differentiate between superhuman and ordinary phenomena, even ones that lack a concept of religion as such.<sup>106</sup> Because that distinction is universal and timeless, it is legitimate to apply the category of religion to every society.

Even this definition, with its widespread support within the social sciences, is not likely to be of much help to judges or lawyers. The reason is simple: it does not serve legal purposes. Most critically, it bears an imperfect relationship to commonsensical notions of what courts ought to protect. After all, American courts are likely to adjudicate claims by congregants irrespective of whether their beliefs or practices reference the superhuman or supernatural. Buddhists, for example, will doubtless be able to invoke free exercise and statutory guarantees even if their particular school does not happen to subscribe to conceptions of theistic beings or spiritual forces. Similarly, practicing Jews will count as religious in courts, although they hold diverse views about the existence of God or other supernatural phenomena. Simply identifying as a Buddhist or a Jew will be enough to win legal protection—that seems beyond debate.

Yet there are resources within the academic study of religion for thinking about religion beyond the bounds of that discipline. Some scholars have recognized that their definitions are not designed to set religion apart from other social phenomena for all possible purposes. Jonathan Z. Smith, for example, recognizes that religion is an abstract analytic category that scholars tailor to their own academic objectives.<sup>107</sup> He sees in this no reason for skepticism.

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<sup>105</sup> Riesebrodt, *supra* note 90, at xiii (“Whatever I say about religions is taken from their own self-representations.”). Here he is drawing on the tradition of Weberian interpretive sociology.

<sup>106</sup> *Id.* at xii, 1–2, 77.

<sup>107</sup> “‘Religion,’” he says, “is not a native term; it is a term created by scholars for their intellectual purposes and therefore is theirs to define.” Smith, *supra* note 102, at 281; see also *id.* at 269 (“‘Religion’ is an anthropological not a theological category.”); cf. Jonathan Z. Smith, *Imagining Religion: From Babylon to Jonestown* xi (1982) (“Religion is solely the creation of the scholar’s study. It is created for the scholar’s analytic purposes by his imaginative acts of comparison and generalization. Religion has no independent existence apart from the academy.”). Other scholars of religion seem to agree that definitions of religion ought to be institutionally specific and

Saying that religion should be defined in a way that is specific to institutional objectives is not the same as saying that the endeavor is impossible.<sup>108</sup> The point is only that a substantive definition that works quite well for comparativists may not work for courts.

That is not to say that courts can interpret the term religion to mean anything at all. Of course there are limits. Correspondence with commonsensical understandings of religion provides one sort of outer boundary,<sup>109</sup> and the background requirement of reasonableness provides another. However, courts have enough latitude within these constraints to hand down decisions required by the commitments and concerns that underlie religious freedom guarantees. In difficult cases where it really matters, definitional approaches should not circumvent meticulous substantive determinations.

## 2. *Legal Definitions*

Perhaps more surprising, even legal attempts to define religion hold little promise for courts faced with questions like whether to protect nonbelievers against government discrimination or whether nonestablishment prohibits a town from expressing support for atheism. Definitions of religion, while interesting and not necessarily harmful, do little work independent of an analysis of how nonbelievers should fare with respect to one or another doctrine. Here, rather than reviewing multiple definitions, I focus on the best available attempt.

To my mind, the most persuasive theory of how to define the concept of religion for legal purposes is Professor Kent Greenawalt's analogical approach. Greenawalt advises courts to ask how closely an unfamiliar system of beliefs and practices resembles undisputed religions—looking for a Wittgensteinian “family resemblance.”<sup>110</sup> He lists characteristics or conditions that may

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pragmatically oriented. See Beckford, *supra* note 94, at 4; Riesebrodt, *supra* note 90, at 1.

<sup>108</sup> Smith, Religion, *supra* note 102, at 281.

<sup>109</sup> See 1 Greenawalt, *supra* note 1, at 143 (arguing that correspondence with nonlegal understandings of religion is desirable in a definitional approach).

<sup>110</sup> *Id.* at 139. Greenawalt built on the approach of Judge Adams of the Third Circuit. In *Malnak v. Yogi*, 592 F.2d 197, 207–09 (3rd Cir. 1979) (Adams, J., concurring), he wrote that courts should proceed by analogy: they should assess an unfamiliar set

be helpful in that comparison, but he emphasizes that none is indispensable or even usually present, and even a single one could be enough.<sup>111</sup> They include: a conception of a god or gods; belief “in a spiritual domain that transcends everyday life;” a comprehensive worldview; an account of the afterlife; communication with the divine through liturgy or worship; a morality; and sacred texts, among others.<sup>112</sup> Greenawalt acknowledges a potential for bias in the analogical method, depending on the religion that is chosen as the baseline for comparison, and he therefore urges courts to choose religions that are sufficiently nonwestern.<sup>113</sup> He rightly says that judges should employ the analogical method in a context-sensitive way, meaning that what counts as religion could differ depending on the particular legal issue, but he resists any sharp distinction between free exercise and nonestablishment cases.<sup>114</sup> Stepping back, he calls his method a “flexible analogical approach.”<sup>115</sup>

Greenawalt’s project has many virtues. It is flexible and nuanced, and it resonates with his broader eclectic theory of religious freedom, a perspective that has significant benefits (as well as some drawbacks).<sup>116</sup> Like that general methodology, his way of defining religion appreciates the complexity of judicial decision making in this area of law.

I wonder, however, whether his definitional enterprise helps to solve the puzzle of nonbelievers. Does it tell us anything independent of substantive analysis concerning, for instance, whether nonbelievers ought to receive exemptions from general laws or

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of beliefs and practices by reference to known religions. In doing so, they could consider that traditional religions commonly share three elements: (1) they speak to “fundamental problems of human existence,” (2) they claim to establish a “comprehensive truth,” and (3) they tend to exhibit certain external or formal signs of religiousness. *Id.* at 208–10. Judge Adams clearly disclaimed any effort to establish a test for religion, and he suggested (less clearly) that none of these factors was necessary or sufficient for a finding of religiousness. See also *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981) (Adams, J.).

<sup>111</sup> 1 Greenawalt, *supra* note 1, at 139–41.

<sup>112</sup> *Id.* at 139–40.

<sup>113</sup> *Id.* at 140 & n.57 (responding to Eduardo Penalver, Note, The Concept of Religion, 107 Yale L.J. 791, 815–16 (1997)).

<sup>114</sup> *Id.* at 141–42.

<sup>115</sup> *Id.* at 142.

<sup>116</sup> See Nelson Tebbe, Eclecticism, 25 Const. Comment. 317 (2008) (reviewing 2 Kent Greenawalt, Religion and the Constitution: Establishment and Fairness (2008)).

whether atheist groups can receive government funding or other support? To the degree that proceeding by analogy generates the right results, is that because it incorporates judgments regarding the best application of legal values and pragmatic considerations? Perhaps asking whether nonbelievers count as religious in one legal domain rather than another is a less direct way of asking whether they deserve protection there.

These questions follow from the metadefinitional point above. Religion can and should be conceptualized differently in different institutional settings in order to serve their particularized objectives. When the institution is a court, those objectives will differ somewhat from rule to rule. Greenawalt is therefore correct that courts should appreciate the differences between doctrinal contexts when determining the scope of religious freedom rules. But if I am right that the matter of whether nonbelievers count as religious for the purposes of a particular doctrine turns on the purposes or values that courts properly take into account in interpreting that provision—the same values that determine the result—then the conceptual yield of defining religion in an analogical way is not obvious. It might be more straightforward and transparent to simply consider whether nonbelievers ought to be included on the merits, rather than asking whether nonbelief counts as a religion for the purposes of a given rule.

Interestingly, Greenawalt himself seems to recognize the limited utility of even his own method when he applies it to a particular case. And the example that he chooses to test his theory in the chapter on defining religion is the problem of nonbelievers. There, he resists the conclusion—endorsed by Laycock, among others<sup>117</sup>—that atheism ought to count as religion for all constitutional purposes, at least within the bounds of reason and common sense.<sup>118</sup> But he also says that “[t]he idea that atheists and agnostics have no rights of religious exercise available to believers is deeply disturbing.”<sup>119</sup> Not surprisingly, he seeks a middle path.

It is striking that when it comes down to the particular matter of nonbelievers he does not consistently analogize to undoubted relig-

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<sup>117</sup> Laycock, *supra* note 1, at 326.

<sup>118</sup> 1 Greenawalt, *supra* note 1, at 140 & n.58.

<sup>119</sup> *Id.* at 149.

ions in the way that his approach to defining religion seems to require.<sup>120</sup> Rather, he refers to the complex of substantive religious freedom values, in the manner of his more general approach to religious freedom.<sup>121</sup> When he discusses, for instance, whether non-establishment bars official teaching of atheism, he observes that it would be unfair to prohibit the government from endorsing positive assertions about religious truth while allowing it to endorse negative ones.<sup>122</sup> That unfairness has constitutional implications because of equality norms grounded in nonestablishment and equal protection.<sup>123</sup> In another place, Greenawalt says that atheists enjoy basic free exercise rights, “whether or not atheism is a religion,” because the right to free exercise includes the right not to be forced to observe a religion, regardless of whether you are religious.<sup>124</sup> In sum, Greenawalt’s method works well in practice partly because it is not definitional at all in the conventional sense—instead, it sometimes answers difficult questions about the coverage of the free exercise and nonestablishment clauses by reference to values and principles driving those provisions.

A likely explanation is that a concern for equality or evenhandedness informs Greenawalt’s definitional project.<sup>125</sup> Finding a way to define the concept of religion helps to ensure that unfamiliar groups are treated fairly by courts. Definitions are desirable, on this view, because they help discipline judges who might otherwise be subject to bias when dealing with nonbelievers or other spiritual minorities. That is a laudable objective. My sense, however, is that it might be clearer to simply ask whether nonbelievers should be protected in each doctrinal area, taking all the relevant values into account—including equality or fairness. After all, a sufficiently nuanced definitional approach like Greenawalt’s is not likely to effectively constrain judges who are otherwise inclined to disfavor non-

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<sup>120</sup> After all, his discussion of nonbelievers comes within his larger defense of the flexible analogical approach to defining the concept of religion. That suggests that he is approaching the problem from a definitional perspective. Yet he seldom reasons by analogy to recognized religions.

<sup>121</sup> I look at his substantive arguments in Part III, *infra*, where I lay out my own doctrinal analysis.

<sup>122</sup> 1 Greenawalt, *supra* note 1, at 150.

<sup>123</sup> *Id.* at 150–51.

<sup>124</sup> *Id.* at 149.

<sup>125</sup> I am grateful to Douglas Laycock for bringing this possibility to my attention.

believers. Moreover, drawing attention to the concerns that in fact drive judicial determinations in such cases could actually bring greater transparency—and thus accountability—to those decisions.

I conclude that definitional approaches to the problem of nonbelievers, whether grounded in the study of religion or in the study of law, are not likely to be particularly helpful, even if they are also not particularly harmful. The most promising of them is attractive only to the degree that it is not rigidly definitional, but instead allows consideration of how nonbelievers should be treated in specific doctrinal contexts. So there is little to be gained by asking whether nonbelief “is” religion in a given legal setting, as opposed to asking whether it should be protected there. Moreover, there is a potential cost, namely distraction from the substantive matters that should be (and perhaps in fact are) driving the analysis. If all that is correct, then the search for a legal definition of religion, so often called for if not actually undertaken, may not be as pressing as it is commonly said to be.

### *C. Religion’s Specialness*

Some prominent thinkers are arguing that religion is not special and should neither be privileged nor uniquely burdened in American law. There is no reason, they say, to single out religion either for advantages under free exercise or for disadvantages under non-establishment.<sup>126</sup> Nonbelievers often provide the paradigm case, but consequences for them vary, with some arguing that free exercise law should be leveled up to include them<sup>127</sup> and others saying that the only workable solution is to level down, so that neither religious nor nonreligious people can claim exceptional protection in

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<sup>126</sup> For recent examples, see Eisgruber & Sager, *supra* note 46, at 124; Brian Leiter, *Foundations of Religious Liberty: Toleration or Respect?*, 47 *San Diego L. Rev.* 935, 957–59 (2010) (noting that “no principled argument” supports treating religion as special in law); Brian Leiter, *Why Tolerate Religion?*, 25 *Const. Comment.* 1, 2, 15 (2008) (defining religion narrowly and arguing there are no good principled reasons to tolerate religion as such).

<sup>127</sup> For instance, the probable nonbelievers in *United States v. Seeger*, 380 U.S. 163, 164–66 (1965), and *Welsh v. United States*, 398 U.S. 333, 343–44 (1970), were given conscientious-objector status even though the statute limited relief from conscription to religious pacifists. Eisgruber and Sager would extend this approach to all deep commitments. Eisgruber & Sager, *supra* note 46, at 112–14.

court.<sup>128</sup> This question is distinct from the matter of whether nonbelievers fall under a definition of religion.<sup>129</sup> Although the two issues are related, they are not the same. Most obviously, people who define religion narrowly, so that it does not include nonbelievers, may still argue that atheists or agnostics should be protected (or burdened) on the ground that there is no good reason to separate out religion.

In this Section, I argue that how courts answer the question of whether religion is special—specifically with regard to nonbelievers—depends on a range of considerations, including history, precedent, practicality, and constitutional values. Moreover, the answer may vary from doctrine to doctrine. Judges should neither always treat religion just like other cultural formations nor always consider it to be distinct. Instead, they should carefully sort out the rationales that drive particular areas of law and then decide whether these reasons justify treating nonbelievers similarly.

I organize this Section around a powerful contemporary critique of the idea that religion is unique for legal purposes. Eisgruber and Sager offer a theory that is principally designed to reject most spe-

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<sup>128</sup> For instance, Justice Stevens has argued that the Religious Freedom Restoration Act (“RFRA”) violates the Establishment Clause because it gives special protection to religious landowners as against “atheist” landowners. *City of Boerne v. Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring). Some theorists have argued against exemptions for any group, in several contexts. See, e.g., Stephen G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. Pitt. L. Rev. 75, 79 (1990) (“Religious belief and practice should be protected under the first amendment, but only to the same extent and for the same reason that all other forms of expression and conscience are protected . . .”).

<sup>129</sup> That the term religion appears in the text of the First Amendment and in many recent statutes is a challenge to the position that religion should not occupy a special status in American law. Its adherents, however, do not find that objection difficult to overcome. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245, 1270 (1994) (criticizing the textual argument for special constitutional treatment of religion); Gey, *supra* note 128, at 148 (same); Andrew Koppelman, *Is it Fair to Give Religion Special Treatment?*, 2006 U. Ill. L. Rev. 571, 577–78 (following the common assumption that the text of the First Amendment is vague, that political theory can help to specify its content, and that “[i]f singling out religion for special treatment is unfair, then the ambiguous words of the First Amendment should not be construed to require, or perhaps even to permit, this unfairness”). But see Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 9–10, 12–16 (2000) (making the textual argument).



cial protection for religion. I will argue, however, that when it comes down to the specifics of difficult cases, they do in fact allow for differential treatment of believers and nonbelievers. At least in those places, they acknowledge that religion occupies a singular place in society—even though that acknowledgment cannot easily be squared with their overall scheme. I conclude that the most persuasive critics in fact employ a disaggregated approach to the question of whether religion is special, at least in certain practical applications, if not as a matter of ideal theory.

Eisgruber and Sager defend an approach—"equal liberty"—under which constitutional guarantees of religious freedom are best read as requiring government evenhandedness toward all deep and valuable commitments. A central feature of equal liberty, therefore, is that religion should be subject to neither extraordinary protections nor extraordinary burdens in law. That goes both for free exercise and for nonestablishment.

Judges need not be completely blind to religion, however.<sup>130</sup> They can and must cognize it to the degree necessary to combat existing discrimination, both against religious minorities and in favor of religious majorities. In this way, religion is similar to other identity characteristics that have provided the basis for exclusion from the political community, such as race or gender. Law may target remedies to this sort of bias. Otherwise, however, special treatment for observant people and congregations is inappropriate.<sup>131</sup> In other words, the only reason to treat religion specially is to guarantee that it is not treated especially badly.

Their critique aims to decimate some familiar arguments for religion's unique place in constitutional law.<sup>132</sup> What is more, the core

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<sup>130</sup> Cf. Philip B. Kurland, *Religion and the Law: Of Church and State and the Supreme Court* 17–18 (1962) (arguing that the First Amendment prohibits the government from classifying on the basis of religion).

<sup>131</sup> Eisgruber and Sager explain: "Religious faith receives special constitutional solicitude . . . only because of its vulnerability to hostility and neglect. . . . Equal [l]iberty insists that aside from this deep and important concern with discrimination, we have no constitutional reason to treat religion as deserving special benefits or as subject to special disabilities." Eisgruber & Sager, *supra* note 46, at 52. In an earlier piece, they put the point this way: "What properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value . . ." Eisgruber & Sager, *supra* note 129, at 1248.

<sup>132</sup> For a summary of the traditional arguments for the specialness of religion, as well as a critique of each, see Michael E. Smith, *The Special Place of Religion in the Con-*

intuition of equal liberty pertains directly to nonbelievers. In one representative passage, Eisgruber and Sager explain that the “vulnerability of non-mainstream religious views—including views that repudiate religion in any of its recognizable forms—to discrimination is what justifies the special constitutional treatment of religion on some occasions.”<sup>133</sup> If believers deserve specific protection because they have been particularly susceptible to disadvantage, then nonbelievers deserve that same sort of solicitude. After all, they have experienced exclusion and neglect on par with the most reviled religious minorities. Therefore, the way law handles believers is not so special after all—every group that has experienced extraordinary prejudice on the basis of deep and valuable commitments deserves extraordinary constitutional concern.

Conversely, privileging familiar religion over atheism or agnosticism is impermissible. For instance, they applaud the results in *United States v. Seeger* and *Welsh v. United States*, where the Court extended conscientious objector status beyond religious pacifists to draftees who arguably based their opposition to war on commitments other than religious ones.<sup>134</sup> Opposition to giving religious claimants protection that nonreligious people cannot receive, even if they are driven by deep commitments, is in fact the main point of their entire argument.<sup>135</sup> So equal liberty is a good example of the type of theory that I am addressing in this Section: it does not seek to define religion to include nonbelief, but instead it argues that regardless of how religion is defined, atheism and agnosticism should be treated in an equivalent way.<sup>136</sup>

What is wrong with this approach, if anything? Focusing on nonbelievers brings out an interesting complication. Although equal

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stitution, 1983 Sup. Ct. Rev. 83; see also Gey, *supra* note 128, at 120–66 (1990); McConnell, *supra* note 129, at 16–31.

<sup>133</sup> Eisgruber & Sager, *supra* note 46, at 62; see also *id.* at 53 (“Equal [l]iberty asks how government should treat *persons* who have diverse commitments regarding religion (including, in some cases, a commitment to reject religion) and for whom those commitments are important components of identity and well-being.”).

<sup>134</sup> *Id.* at 113–14.

<sup>135</sup> For example, zoning laws should not exempt a religious person who wishes to operate a soup kitchen in a prohibited area while barring someone who wants to run a soup kitchen for reasons that are profound and worthwhile but not religious. *Id.* at 11.

<sup>136</sup> They address the definition of religion, and argue that it should not matter in any detailed way for legal analysis, in Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 *Notre Dame L. Rev.* 807, 829–30 (2009).

liberty holds that belief and nonbelief should virtually always be handled the same way (outside antidiscrimination law), it does in fact sometimes allow greater care for belief, even as compared to nonbelief, and certainly as compared to nonreligion or simple moral conscience.<sup>137</sup> Although there is some ambiguity here, as I will explain below, the best reading of the work is that it does actually assimilate at least a few widespread intuitions that religion is singular. Therefore, at least in practice, it compromises its purported single-mindedness more freely than many suppose. I may disagree with how Eisgruber and Sager draw particular lines—whether or not religion is exceptional in one doctrinal context or another—but here the key point is methodological: their approach to the question of specialness is, at a minimum, somewhat polyvalent.

Church autonomy is a key doctrine for illustrating this point. Many Americans share a sense that churches and synagogues deserve customized legal treatment—a social fact that Eisgruber and Sager acknowledge and seek to incorporate.<sup>138</sup> In particular, congregations should enjoy a relatively free hand in hiring their leaders. They should be able to hire only men as clerics, for instance, even though antidiscrimination laws prohibit other employers from discriminating on the basis of gender. This sentiment is written into constitutional law in the “ministerial exemption” rule, which forms an important component of the broader church-autonomy doctrine.<sup>139</sup> Eisgruber and Sager agree that congregations should have

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<sup>137</sup> Professor Andy Koppelman has argued forcefully and influentially that protecting religion against discrimination is a kind of privileging because not all human concerns are protected against discrimination. All those that are protected are privileged relative to those that are not. Therefore Eisgruber and Sager’s claim that religion should not be privileged, only protected, is not quite right, according to him. See Koppelman, *supra* note 129, at 581–83. I go a bit further here and contend that perhaps Eisgruber and Sager are willing to tolerate some legal differentiation even among deep commitments—belief and nonbelief.

<sup>138</sup> Eisgruber & Sager, *supra* note 46, at 57 (“[A]lmost everybody believes that in some cases religion requires special treatment. Almost everyone believes, for example, that, unlike other private employers, a church should be able to insist that its priests be men.”); see also McConnell, *supra* note 129, at 20 (“Most people would find it shocking for the government to tell the Catholic Church or an Orthodox synagogue that it must hire women as priests or rabbis. This exemption is a fundamental aspect of the separation between church and state.”).

<sup>139</sup> I explain this rule more fully below, in the doctrinal discussion. See *infra* Section III.C.

wide latitude to hire clergy without regard to antidiscrimination laws. They say that this is one place where “[e]qual [l]iberty supports our strong sense that religion sometimes requires special treatment.”<sup>140</sup>

To reconcile church autonomy with equal liberty, they try to show that it is actually not so special. The ministerial exemption can be harmonized with equal liberty, they say, because the constitutional values that give churches autonomy in hiring—autonomy and freedom of association—also apply broadly to plainly secular organizations.<sup>141</sup> They point out that the Supreme Court also ruled for the Boy Scouts, who excluded gay men from scoutmaster positions despite local antidiscrimination laws.<sup>142</sup> So for them institutional autonomy in employment is something enjoyed not only by churches, but also by other voluntary associations—or at least the ones that provide “private relational benefits” such as wise guidance and friendship.<sup>143</sup> Outcomes depend on the “structure of activities and leadership” in the association, as well as on the expectations of participants.<sup>144</sup> Thus, religious congregations are special only in the way that all such voluntary associations are special vis-à-vis other organizations.<sup>145</sup>

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<sup>140</sup> Eisgruber & Sager, *supra* note 46, at 66.

<sup>141</sup> *Id.* at 64–65. Autonomy is a principle that they root in cases concerning privacy or substantive due process. As they acknowledge, however, those cases all concerned intimate decisions, such as how to educate a child or whether to terminate a pregnancy, which seem to have little relevance for church management. They therefore place more emphasis on freedom of association, which does concern organizations as such. Cf. McConnell, *supra* note 129, at 19 (challenging the view that churches receive protection only insofar as they are examples of private institutions and observing that “the aspects of human life that are deemed sufficiently ‘private’ to be shielded from state power are few”).

<sup>142</sup> Eisgruber & Sager, *supra* note 46, at 64–65 (discussing *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000)).

<sup>143</sup> *Id.* at 65.

<sup>144</sup> *Id.* Their language here is specific to the Boy Scouts, but they do also suggest that it applies more widely to all voluntary associations.

<sup>145</sup> This is what they mean when they say that equal liberty “seeks to understand the widely-held view that churches should be free from state interference in their choice of clergy by drawing on constitutional values of autonomy and freedom of association that run to the benefit of all members of our constitutional community.” *Id.* at 63 (emphasis added). In one place, Eisgruber and Sager suggest that the application of the principle of freedom of association differentiates churches because they are “structural anomalies” in regard to the type and range of associational services that they

What troubles this conclusion is that churches are in fact more exceptional than that, according to the commonplace intuition that Eisgruber and Sager seek to capture—in at least two distinct ways. First, congregations can make a broader range of hiring decisions under the ministerial exemptions doctrine than can voluntary associations, even under their broad reading of the law on associations. As courts have repeatedly held, parishes are free to hire and fire their clerics, even if those decisions are not theologically mandated or even recommended.<sup>146</sup> It is inappropriate, under these cases, for government to interfere in clergy employment—not just when decisions are motivated by religious reasons, but more generally. This marks an important difference.<sup>147</sup> It captures a sense that faith communities really do enjoy extraordinary institutional autonomy.<sup>148</sup> By contrast, I doubt whether Eisgruber and Sager would allow the Boy Scouts to make any sort of discriminatory hiring decision they like, no matter how poorly connected to the organization's objectives.<sup>149</sup>

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provide. *Id.* But later it seems that organizations like the Boy Scouts also qualify for protection. *Id.* at 65.

<sup>146</sup> Virtually every circuit court has applied the ministerial exemption and has interpreted it to have this broad scope. See *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir. 2006) (“The ministerial exception, as we conceive of it, operates to bar any claim, the resolution of which would limit a religious institution’s right to select who will perform particular spiritual functions.”); *id.* at 304–05 & n.7 (listing other circuit court cases). The only possible exception among federal appellate courts is the Eleventh Circuit, which has applied the exemption without addressing whether it applies to employment decisions that are not religiously motivated. See *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303 (11th Cir. 2000). But see *McKelvey v. Pierce*, 800 A.2d 840, 851 (N.J. 2002) (ruling that the church autonomy doctrine only prohibits review of a breach of contract claim brought by a prospective cleric where it involves conduct “rooted in religious belief”) (internal quotation marks omitted); Marci A. Hamilton, *God vs. the Gavel: Religion and the Rule of Law* 190–91 (2005) (arguing that the ministerial exemption should be limited to situations where employment discrimination is required by the organization’s beliefs and observing that an “increasing number of courts” follow this approach).

<sup>147</sup> See *McConnell*, *supra* note 129, at 20–21 (“[T]he religious exemption is far broader than [the exemption in *Dale* and similar cases]. A church or synagogue does not need to demonstrate that employment of any particular person would be inconsistent with its expressive purpose . . . . The religious exception is *sui generis*.”).

<sup>148</sup> For a similar argument, see Andrew Koppelman & Tobias Barrington Wolff, *A Right To Discriminate? How the Case of Boy Scouts of America v. James Dale Warped the Law of Free Association* 142 n.26 (2009).

<sup>149</sup> Eisgruber and Sager resist the need to find some *expressive* aspect to an association in order to win protection, but they do think that a court’s decision to exempt

The ministerial exemption rule stands apart in another way, too. Whereas freedom of association can be overbalanced by important government objectives, the ministerial exemption is virtually absolute. Courts addressing clergy employment claims do not seriously consider the state's countervailing interest in, say, preventing discrimination.<sup>150</sup> By contrast, freedom of association must give way to sufficiently compelling government interests.<sup>151</sup>

At least two conclusions could follow from these tensions. If Eisgruber and Sager really support the entire ministerial exemption rule, then they are granting religion a more distinctive constitutional status than their theory of equal liberty can comfortably explain. If, on the other hand, they think that churches and synagogues should be able to make discriminatory hiring decisions only in the same way as other voluntary associations like the Boy Scouts, then they are not fully capturing the intuition, shared by virtually every circuit, that congregations deserve extraordinary protection from government interference. Either way, the ministerial exemption branch of the church autonomy doctrine poses a problem for their equality-based attack on the singular treatment of religion in contemporary constitutional law. Overall, my impression is that Eisgruber and Sager do indeed mean to accommodate the whole ministerial exemptions rule, even though that special concern for religion is hard to square with equal liberty.

Nonestablishment of religion in government expression is another place where Eisgruber and Sager seem to think that constitutional law rightly treats religion differently. They say it is impermissible for the government to endorse religion because that would send a message of exclusion or disparagement to others. This is a matter of what they call social meaning—the significance that an endorsement will have for people living in a particular society with a particular history, regardless of the subjective intent of officials

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employment discrimination should “turn on” certain factors, such as the organization's activities and leadership structure. Eisgruber & Sager, *supra* note 46, at 65. That suggests that even under their theory groups like the Boy Scouts would not have the same degree of hiring autonomy as congregations do under the ministerial exemption rule.

<sup>150</sup> McConnell et al., *Religion and the Constitution* 318 (2d ed. 2006) (citing cases).

<sup>151</sup> *Id.* (citing *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (explaining that the compelling state interest test applies to expressive association claims)).

or the actual perception of individual citizens.<sup>152</sup> And as a matter of social meaning in America today, endorsing religion has something of a distinctive impact on social and political membership. Here, Eisgruber and Sager's method for determining whether religion is special is disaggregated in a couple of ways. First, it allows for distinctions among scenarios. Judges must stay alert to the details of particular disputes—they have to decide in each case whether government expression constitutes an endorsement of religion that offends equal liberty. Second, it allows for doctrinal differentiation. Religion is distinct in the nonestablishment area in ways that it does not appear to be in other areas, such as nondiscrimination or free-exercise exemptions, if only as a consequence of contingent understandings. With regard to nonestablishment, equal liberty generates distinct outcomes for recognized religious groups, but when it comes to free-exercise exemptions all deep and valuable convictions receive similar constitutional concern, without regard to group understandings.

If my understanding of equal liberty is right, then the methodological takeaway is that figuring out whether religion is special, as against nonbelief, might well be something of a particularized inquiry, even for Eisgruber and Sager. Church autonomy and government endorsement are two areas where that seems to be the case. At a minimum, Eisgruber and Sager's inquiry may be more polyvalent and disaggregated than many think, given their outspoken opposition to the special place of religion in constitutional law. In fact, equal liberty may well apply differently to nonbelief than to recognizable religious forms—if only in a particular case, decided in a particular society, under a particular branch of religious freedom law.

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My conclusion is that judges should take a piecemeal approach, rather than a wholesale one, to the question of whether nonbelief should be protected under religious freedom provisions. Defini-

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<sup>152</sup> Eisgruber & Sager, *supra* note 46, at 124–28; see also Eisgruber & Sager, *supra* note 136, at 830–31. For an interesting treatment of their theory of government endorsement, see Abner S. Greene, *Three Theories of Religious Equality . . . and of Exemptions*, 87 *Tex. L. Rev.* 963, 980–81 (2009).

tional approaches are unhelpful, and they risk masking the substantive work that properly determines outcomes in the most nimble theories. Nor does the argument that religion is not special offer judges a palatable way around careful doctrinal work. A range of principled and pragmatic considerations should and do matter, and they matter in different ways in different areas of doctrine, as I will now show.

### III. DOCTRINE

Should nonbelief be protected alongside traditional religion? In this Part, I argue that the answer should vary from doctrine to doctrine and from situation to situation. Neither an approach that limits protections to believers, nor one that handles nonbelievers in the same way as conventional believers is ultimately convincing. The latter conclusion will probably prove more surprising, yet in fact there are some areas in which legal rules are specific to familiar religions, given existing American traditions, constitutional understandings, and social practices.

I begin by showing that antidiscrimination protection for so-called unbelievers or infidels presents perhaps the easiest case for similar legal treatment. Harder is the question of exemptions from general laws, which I address in Section B. Although it is possible to imagine strong exemption claims, courts may approach some of them with a degree of skepticism not appropriate for recognized religions. Section C describes why rules protecting the autonomy of religious institutions should not extend to organizations of atheists, agnostics, or humanists. Finally, I present arguments against easy application of all nonestablishment rules to nonbelief.

#### *A. Nondiscrimination*

Perhaps the most fundamental rule of religious freedom is that explicit or purposive discrimination on the basis of religion is presumptively unconstitutional. Whatever else the Constitution holds for nonbelievers, it protects them from unwarranted government discrimination.

To a degree, this position follows from precedent. The Court has warned against governmental disfavor not only of religion but also



of irreligion.<sup>153</sup> The most significant decision is *Torcaso v. Watkins*, where it held that the Maryland Constitution could not limit public office to those who were willing to declare a “belief in the existence of God.”<sup>154</sup> While the Maryland text did not target nonbelievers as such, since polytheists (and other believers) would also have been unwilling to agree to the declaration, the Court’s reasoning would apply to clearer exclusions of nonbelievers as well. Not only the Religious Test Oath Clause of Article VI, along with the provision that allows federal and state officials to choose an affirmation rather than an oath, but also the religion provisions of the First Amendment bar the government from forcing persons “to profess a belief or disbelief in any religion.”<sup>155</sup> More specifically, these provisions work together to prohibit exclusions of nonbelievers from public office.

Instances of discrimination against nonbelievers—past and present—are regrettably easy to find. Courts have prohibited nonbelievers from testifying,<sup>156</sup> judges have refused to credit their dying declarations,<sup>157</sup> atheists have been prohibited from serving on juries,<sup>158</sup> states have barred nonbelievers from public office with vary-

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<sup>153</sup> *Van Orden v. Perry*, 545 U.S. 677, 734–35 (2005) (Stevens, J., dissenting) (“The evil of discriminating today against atheists, polytheists, and believers in unconcerned deities, is in my view a direct descendent of the evil of discriminating among Christian sects. The Establishment Clause thus forbids it . . .”) (citation and quotation marks omitted); *Wallace v. Jaffree*, 472 U.S. 38, 52–53 (1984) (“[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.”).

Interestingly, Justice Scalia has suggested that Ten Commandments displays are constitutional even if they endorse belief over nonbelief. *McCreary v. ACLU*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting, joined by Rehnquist, C.J. and Thomas, J.) (calling “demonstrably false” the “principle that the government cannot favor religion over irreligion”).

<sup>154</sup> *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

<sup>155</sup> *Id.* at 493 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)).

<sup>156</sup> See, e.g., B.H. Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States*, 39 *Yale L.J.* 659, 668 (1929); Paul Kaufman, *Disbelieving Nonbelievers: Atheism, Competence, and Credibility in the Turn of the Century American Courtroom*, 15 *Yale J.L. & Human.* 395, 403 (2003); Charles E. Rushing, *The First Amendment and Civil Disabilities Imposed Upon Atheists*, 3 *Duke B.J.* 137, 138 (1952).

<sup>157</sup> See, e.g., *Carver v. United States*, 164 U.S. 694, 697 (1897); Rushing, *supra* note 156, at 145–46.

<sup>158</sup> See, e.g., *State v. Mercer*, 61 A. 220, 221 (Md. 1905); Rushing, *supra* note 156, at 145.

ing degrees of specificity,<sup>159</sup> parents who reject religion have been disadvantaged in child custody cases,<sup>160</sup> aspiring parents have faced obstacles to adoption,<sup>161</sup> inmates allegedly have been denied medical treatment because of their atheism,<sup>162</sup> soldiers have claimed that they were berated and discharged because of their disbelief,<sup>163</sup> and some nonbelievers have been discriminated against in employment.<sup>164</sup> So not only have nonbelievers been the target of negative attitudes, but some number of them have also long suffered discriminatory acts.

Commentators mostly agree that nonbelievers deserve protection against discrimination, although they locate that rule in various constitutional provisions.<sup>165</sup> Eisgruber and Sager, for instance,

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<sup>159</sup> See, e.g., Ark. Const. art. 19, § 1 (“No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any Court.”); Rushing, *supra* note 156, at 146 (citing other examples).

<sup>160</sup> See, e.g., *Pountain v. Pountain*, 503 S.E.2d 757, 761 (S.C. Ct. App. 1998) (granting custody to a mother in part because of the father’s agnosticism); Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. Rev. 631, 727–28 (2006) (citing additional cases); *Agnostic Man Claims Religious Bias Cost Him Custody*, USA Today (Dec. 5, 2010), [http://www.usatoday.com/news/religion/2010-12-05-agnostic05\\_ST\\_N.htm](http://www.usatoday.com/news/religion/2010-12-05-agnostic05_ST_N.htm).

<sup>161</sup> See, e.g., *In re Adoption of E*, 279 A.2d 785, 791 (N.J. 1971).

<sup>162</sup> See, e.g., *Hauschild v. Powers*, No. 09-015-GPM, 2010 WL 1251265, at \*1 (S.D. Ill. 2010) (noting that a prison doctor allegedly had stated “I don’t treat Atheists.”). Although the claims brought were for Eighth Amendment deliberate indifference and First Amendment retaliation, a religious freedom claim would have survived as well.

<sup>163</sup> See, e.g., Neela Banerjee, *Soldier Sues Army, Saying His Atheism Led To Threats*, N.Y. Times, Apr. 26, 2008, at A14.

<sup>164</sup> See, e.g., *Young v. Sw. Sav. & Loan Assoc.*, 509 F.2d 140, 141, 144 (5th Cir. 1975) (finding that an atheist employee was “the victim of religious discrimination” and was constructively discharged after she refused to attend regular prayer meetings); U.S. Comm’n on Civil Rights, *Religious Discrimination: A Neglected Issue* 94–96 (1979) (statement of Charles Reams, Jr., President, Humanist Association of the National Capital Area) (describing additional instances); cf. Richard H. Sander & Jane Yakowitz, *The Secret of My Success: How Status, Prestige and School Performance Shape Legal Careers* 38 (Oct. 22, 2010) (unpublished manuscript, available at <http://ssrn.com/abstract=1640058>) (noting some empirical data that suggest that non-believing and unaffiliated lawyers earn less than religiously affiliated lawyers).

<sup>165</sup> See, e.g., Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. Chi. L. Rev. 805, 813 (1978); Shiffrin, *Foundations*, *supra* note 76, at 62; cf. Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 Ohio St. L.J. 89, 112 n.109 (arguing that state discrimination against nonbelievers should receive something less than strict scrutiny); Carl H. Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 Wm. & Mary L. Rev. 883, 896–97 (2001); John H. Garvey, *An Anti-*

think a primary purpose of free exercise is to ensure that citizens are not devalued on the basis of their spiritual commitments—including nonbelief.<sup>166</sup> If religious groups deserve constitutional protection because they have long been the targets of discrimination, then nonbelievers, who arguably have experienced comparable exclusion, deserve similar protection.<sup>167</sup> To my mind, it matters little where the right is located within the Constitution—regardless, nonbelievers deserve a legal presumption against targeted disfavor.<sup>168</sup>

Do antidiscrimination rules include nonbelievers because nonbelief counts as “religion”? The answer could be yes, in the sense that it would be possible to say that nonbelief counts as religion for antidiscrimination purposes.<sup>169</sup> Yet nothing much turns on that formulation. One could just as easily say that although nonbelief is obviously not religion it deserves similar protection, according to our considered constitutional traditions, because of a freestanding equality principle that does not tolerate exposing atheists and ag-

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Liberal Argument for Religious Freedom, 7 J. Contemp. Legal Issues 275, 288–89 (1996) (suggesting that antidiscrimination rules would be among those that apply to nonbelievers).

<sup>166</sup> Eisgruber & Sager, *supra* note 46, at 52, 114; see also Dorsen, *supra* note 14, at 869. Just as basic as nondiscrimination is the rule that government cannot compel nonbelievers (or anyone else) to observe religious practices, so Greenawalt points out that a law requiring people to attend Roman Catholic Mass each week would be obviously unconstitutional. Greenawalt, *supra* note 1, at 149.

<sup>167</sup> Eisgruber and Sager seem to have drawn this conclusion themselves. See Eisgruber & Sager, *supra* note 136, at 830 (reasoning that if “the Religion Clauses prevent the forms of mistreatment historically associated with religious conflict,” rather than protecting religion itself, then “[t]hose mistreatments include injuries inflicted on the ground that the targeted activity is viewed as *not* religious”). But see Brownstein, *supra* note 165, at 112 (“[W]hile the nonreligious are a minority in American society and have been the subject of discrimination in specific circumstances, far less prejudice and mistreatment has been directed at them historically than is the case for persecuted religious minorities.”).

<sup>168</sup> For instance, there is a fixed sense among the Justices that official bias on the basis of religion is presumptively prohibited by the Equal Protection Clause. That prohibition should extend to government discrimination against nonbelievers.

<sup>169</sup> Judge Wood, writing for the court in *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2005), held that atheism was a religion for First Amendment purposes, but then turned away the free exercise complaint of an inmate who had requested a weekly meeting of atheists. *Id.* at 682–83. Judge Wood reasoned that the inmate’s practice was not burdened. It is not clear, however, that it is necessary for an inmate to show a burden when discrimination among faiths is at stake. The panel did find a nonestablishment violation. *Id.* at 683–84.

nostics to governmental targeting. So again a definitional approach here generates little conceptual or practical yield. As Eisgruber and Sager have put it, for purposes of an antidiscrimination approach like theirs, “[W]e need not decide whether atheism is itself a religion, or whether atheistic or agnostic convictions might ever count as religious.”<sup>170</sup> What matters is that nonbelievers are protected from governmental discrimination.

So far, I have been speaking of laws that discriminate in the sense that they isolate nonbelievers for disadvantageous treatment. What about unequal allocation of accommodations, such as when officials relieve specific believers from regulations but fail to accommodate nonbelievers? Here too, and for similar reasons, equality rules ought to protect nonbelievers. For example, an atheist inmate claimed that his request for a weekly study group had been denied, even though similar requests from familiar religious groups had been granted.<sup>171</sup> Strict limits were placed on all gatherings in the prison, but religious groups were given special permission to congregate, probably in order to comply with RLUIPA, and perhaps also for policy reasons.<sup>172</sup> Judge Wood, writing for the panel, held that the disparity was unconstitutional in the absence of any secular reason why the atheist group presented a greater security risk.<sup>173</sup> That was the correct result. Nondiscrimination rules of both types—those that ban outright targeting and those that prohibit unequal administration of accommodations—apply to nonbelievers in the same way as they apply to familiar observers. That conclusion should generate little controversy. But consensus will be harder to find around other questions, beginning with whether nonbelievers should be able to win exemptions from general laws.

### *B. Exemptions*

American religious freedom law sometimes includes a right to relief from general laws that incidentally burden observance. In other words, even regulations that do not explicitly or purposefully

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<sup>170</sup> Eisgruber & Sager, *supra* note 136, at 827.

<sup>171</sup> *Kaufman*, 419 F.3d at 680.

<sup>172</sup> *Id.* at 683–84 (noting that “normal social groups” who wish to hold meetings face tougher regulations than religious groups do under RLUIPA).

<sup>173</sup> *Id.* at 684.

target religious groups may be invalidated insofar as they thwart free exercise. In such situations, government will be required to carve out exemptions.<sup>174</sup> While this principle is no longer a part of core free exercise doctrine—due to the Court’s controversial turn-about in *Employment Division v. Smith*<sup>175</sup>—it nevertheless persists. First of all, *Smith* preserved certain important exceptions to its general rule.<sup>176</sup> Moreover, federal statutes like RFRA and RLUIPA provide for exemptions.<sup>177</sup> And on the state level, about a quarter of all constitutions have been construed to presumptively guard against laws that impose incidental burdens on free exercise and sixteen states have enacted statutes like the federal RFRA.<sup>178</sup> All told, American law still promises relief for many religious actors whose observances are burdened only incidentally.

Can nonbelievers win this sort of relief from general regulations? Considerations differ from those that are at play in antidiscrimination doctrine. Here, I will argue for a nuanced approach that gives significant protection, but that also recognizes religion’s partial distinctiveness and therefore stops short of extending to nonbelievers exactly the same level of deference that courts show toward ordinary exemption claims.

Some guidance has come from the Court. In two cases concerning military conscription, it ruled that draftees named Seeger and Welsh, who probably were not religious, could qualify for conscientious objector status, even though Congress had explicitly limited relief to people whose pacifism was grounded in religion. Federal statutory law permitted conscription but accommodated people “who by reason of their religious training and belief [were] consci-

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<sup>174</sup> This is different from an equal treatment claim, described in the last paragraph, in that it works even in the absence of any existing exemptions for religious groups.

<sup>175</sup> 494 U.S. 872 (1990).

<sup>176</sup> For a description of these exceptions, see Tebbe, *supra* note 77, at 2057–58.

<sup>177</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2006); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5 (2006).

<sup>178</sup> Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. Rev. 466, 467–69, 477 & n.67 (2010) (citing statutes but observing that they are rarely used); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919, 1950 & n.116 (2006) (listing state court constructions of state free exercise provisions).

entiously opposed to participation in war in any form.”<sup>179</sup> Arguably, both men were nonbelievers. But even if their objections to war were grounded in conscience or morality, unconnected to any belief about the supernatural, the Court’s opinions implied that true atheists and agnostics also would be able to win exemptions, at least in some situations.

Today, these decisions provide clues to how the Court might treat exemptions for identified nonbelievers. For one thing, they suggest an equality concern, namely that granting exemptions to believers alone could impermissibly advantage them relative to nontraditionalists like *Seeger* or *Welsh*.<sup>180</sup> Yet elsewhere the Court has suggested limits on the ability of nonbelievers to win exemptions, even where religious observers enjoy them. In *Yoder*, the Court explained that although Amish children had a free exercise right not to attend school after the eighth grade despite truancy laws, that right would not extend to someone driven by “purely secular” convictions—someone like Henry David Thoreau.<sup>181</sup> There appears to be a genuine tension between this statement in *Yoder* and the rule of *Seeger* and *Welsh*, which protects nonreligious people. How can courts accommodate both the impulse to exempt nonbelievers evenhandedly and the intuition that familiar religious claims are different?

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<sup>179</sup> *United States v. Seeger*, 380 U.S. 163, 164–65 (1965) (citing 50 U.S.C. app. § 456(j) (1958); see also *Welsh v. United States*, 398 U.S. 333, 339–41 (1970). Congress defined religion to mean: “[A] belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [excluding] essentially political, sociological, or philosophical views or a merely personal moral code.” *Seeger*, 380 U.S. at 172 (quoting the statute). After *Seeger* but before *Welsh*, Congress amended the statute to remove the requirement that objectors hold “a belief in relation to a Supreme Being.” See Historical and Statutory Notes, 50 U.S.C.A. app. § 456, at 110 (1990) (“Pub. L. 90-40, § 1(7), struck out provision that religious training and belief stem from the individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relationship.”). The statute retained the requirement that the objection stem from “religious training and belief.” See *Welsh*, 398 U.S. at 335 (quoting the statute). I thank Kent Greenawalt for pointing out this change in the law.

<sup>180</sup> Conventional wisdom holds that the two decisions must be constitutionally driven. Particularly in *Welsh*, but also in *Seeger*, the fit between the outcome and the statute’s language was poor. Justice Harlan, for example, deplored the “liberties taken with the statute” in both majority decisions. *Welsh*, 398 U.S. at 345 (Harlan, J., concurring in the result). He concurred in the judgments only on the ground that exempting traditional believers but not nonbelievers would offend the Constitution. *Id.*

<sup>181</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972).

Some scholars have argued that the tension is in fact not that strong because nonbelief itself generates few actual practices.<sup>182</sup> Mere denial of the existence of the supernatural, or skepticism about it, does not generate demands of action or inaction. And only practices that are closely connected to nonbelief itself deserve protection that is equivalent to what traditional observances enjoy. *Seeger* and *Welsh* were correctly decided, on this view, but that was either because they protected moral claims of conscience that were freestanding of either belief or nonbelief or because they presented virtually the only imaginable examples of practices that were closely integrated into systems of humanism or freethinking.<sup>183</sup>

Yet in fact nonbelievers can and do claim exemptions. They may do so under the Constitution or under statutes like RFRA and RLUIPA or state equivalents. Possible claims are in fact not difficult to imagine. Atheist inmates might sue to compel prison officials to allow them to wear atheist symbols on necklaces despite prison dress regulations,<sup>184</sup> they could claim a right of access to nonbelieving literature despite censorship rules,<sup>185</sup> they conceivably could request vegetarian meals,<sup>186</sup> or they might ask to be allowed to hold weekly meetings for study and discussion of atheist ideas despite general restrictions on gatherings.<sup>187</sup> Freethinkers could bring a free exercise claim (as well as a speech claim) when they

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<sup>182</sup> 1 Greenawalt, *supra* note 1, at 151; Michael McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1, 10–11 (“[U]nbelief entails no obligations and no observances. Unbelief may be coupled with various sorts of moral conviction . . . . But these convictions must necessarily be derived from some source other than unbelief itself.”). Laycock agrees that the tension between nonbelief and most general laws are not particularly strong because the morality of nonbelief shares much with the modern sensibility that also underlies many legal obligations. Douglas Laycock, The Religious Exemption Debate, 11 Rutgers J.L. & Religion 139, 170–71 (2009).

<sup>183</sup> See Thomas Berg, Minority Religions and the Religion Clauses, 82 Wash. U. L.Q. 919, 976 (2004) (“[The draft cases involved] conduct that was not just permitted by a belief in God’s nonexistence, but followed from the belief. Atheists or agnostic draft objectors can plausibly assert that the nonexistence of a theistic god or an afterlife means that this life is of utmost importance, and therefore that the worst thing a person can do is end another’s life.”).

<sup>184</sup> See *Kaufman v. Karlen*, No. 07-2712, 2008 WL 744140, at \*1 (7th Cir. Mar. 20, 2008).

<sup>185</sup> See *id.* at \*3.

<sup>186</sup> Cf. *Koger v. Bryan*, 523 F.3d 789, 793–94 (7th Cir. 2008) (ruling in favor of an inmate who adhered to Thelema, a nontheistic belief system with the sole tenet “do what thou wilt,” even though the creed did not explicitly prohibit eating meat).

<sup>187</sup> See *Kaufman v. McCaughtry*, 419 F.3d 678, 682–83 (7th Cir. 2005).

are prohibited from erecting a winter solstice display on town property.<sup>188</sup> Organizations of secular humanists may request relief from landmark laws so that they can more freely use their property to pursue their missions.<sup>189</sup> Nonbelieving students may seek to be excused from studying the Bible, even as literature.<sup>190</sup> And, as we have already seen, conscientious objectors could claim constitutional immunity from military conscription.<sup>191</sup> These are straightforward examples demonstrating a realistic possibility that nonbelievers will continue to ask courts for relief from general laws for activities that they take to be demanded by their nonbelief.

Moreover, American varieties of nonbelief may be evolving in ways that make them more capable of generating commands of conduct—and thus exemption claims that closely track familiar religious ones. At the very least, nonbelievers themselves are claiming this sort of connection, partly in response to the widespread perception that atheism and agnosticism promote amoral or even immoral ways of living. For example, the American Humanist Association's ("AHA") most recent statement, the *Humanist Manifesto III*, highlights ethics at the very beginning and seeks to show that ethical ideas are integral to its entire system of thought. It defines humanism as a life philosophy that "without supernaturalism[] affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity."<sup>192</sup> It also declares that "[e]thical values are derived from human need and interest as tested by experience," and it sets out a commitment to "treating each person as having *inherent* worth and dignity."<sup>193</sup> Whether claims like these are convincing has traditionally not been central to free exercise jurisprudence.

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<sup>188</sup> See *Wells v. City and County of Denver*, 257 F.3d 1132, 1138 (10th Cir. 2001) (rejecting that claim).

<sup>189</sup> Cf. *Soc'y for Ethical Culture in the City of N.Y. v. Spatt*, 51 N.Y.2d 449, 924 (1980).

<sup>190</sup> Cf. Religion Clause Blog, *School Excuses Atheist Student From Reading Bible as Literature* (Dec. 17, 2009), <http://religionclause.blogspot.com/2009/12/school-excuses-atheist-student-from.html>.

<sup>191</sup> *United States v. Seeger*, 380 U.S. 163, 187 (1965).

<sup>192</sup> *Humanism and its Aspirations: Humanist Manifesto III*, a Successor to the Humanist Manifesto of 1933 (2003), <http://www.americanhumanist.org/system/storage/63/238/HumanismandItsAspirations.pdf>.

<sup>193</sup> *Id.* (emphasis added).



Moreover, although the connection between religious skepticism and ethics is not as clear as it could be in the AHA's short statement, Richard Dawkins, a prominent signer of the manifesto, says more in his bestselling book. There he argues that humanity's moral sense can be derived from its past through a theory of evolutionary biology.<sup>194</sup> Although the details are not critical here, Dawkins essentially believes that the theory of natural selection can account for the widespread human impulse to be good to one another—a moral sense capable of carrying content that is significant and specific.<sup>195</sup> Because evolutionary biology also plays a large role in Dawkins's argument against religion, it appears that he is attempting to lay the foundation for ethical obligations that are integral to his entire humanist project and are capable of issuing practical commands for action and inaction. If something like this description is accurate then it might soon make sense for religious freedom law to protect practices that are demanded by this form of contemporary humanism in much the same way that it protects familiar religious observances.<sup>196</sup>

So far, I have argued that a distinction should be drawn between exemption claims for practices that flow from nonbelief itself and claims that are freestanding from belief or nonbelief. I have focused on the former, where I believe that equality considerations point toward similar constitutional and statutory protection for nonbelievers. Successful exemption claims will be infrequent, but they may be less rare than some have supposed, partly because of developments in some strands of American atheism.

Assuming all of that, should nonbelievers be able to win exemptions *whenever* they claim that general laws conflict with practices that are integral to their nonbelief? This is the more difficult question. My answer is that where nonbelievers can show that their nonbelief itself conflicts with general regulations, their claims for exemptions should be treated as seriously as claims by traditional religious practitioners. Courts, however, retain some ability to

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<sup>194</sup> Dawkins, *supra* note 4, at 245 ("Several books . . . have argued that our sense of right and wrong can be derived from our Darwinian past. This section is my own version of the argument.").

<sup>195</sup> *Id.* at 241–54.

<sup>196</sup> Again, that protection would not depend on a finding that Dawkins's account is particularly convincing.

skeptically examine whether a particular obligation is in fact integral to someone's atheism or humanism—at the very least, they may do so where the adherent plausibly claims a connection that is solely rational, scientific, or otherwise accessible to outsiders.

Let me add support and specificity to that second claim. Where ordinary believers are concerned, courts generally defer to claims that actions or inactions are demanded of individual adherents. That is one aspect of what has come to be known as the “hands off” doctrine.<sup>197</sup> Common justifications include: (1) that religious claims are not subject to rational or objective evaluation;<sup>198</sup> (2) that judges are not competent to assess such claims;<sup>199</sup> (3) that court intermeddling in theology could harm religious congregations (which have special value and/or are particularly susceptible to government intrusion);<sup>200</sup> (4) that matters of doctrine are private and should be of no interest to civil officials;<sup>201</sup> and (5) that secular authorities lack jurisdiction to answer questions properly left to religious institutions.<sup>202</sup>

Without taking a position on whether and how these arguments apply to ordinary religious practitioners—something about which I

<sup>197</sup> See *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) (holding that courts will not second-guess a practitioner's claim that conduct is prohibited by scripture); Samuel J. Levine, *The Supreme Court's Hands-Off Approach to Religious Doctrine: An Introduction*, 84 *Notre Dame L. Rev.* 793, 795 (2009) (“[T]he Court generally eschews decision making that requires adjudication of religious doctrine.”).

<sup>198</sup> *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 714–15 (1976) (“[I]t is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith[,] whether or not rational or measurable by objective criteria.”) (footnote omitted); Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 *Notre Dame L. Rev.* 837, 855–56 (2009). What follows in the text relies on Garnett's summary of the doctrine.

<sup>199</sup> *Thomas v. Review Bd.*, 450 U.S. at 715 (noting that courts are “singularly ill equipped” to resolve intrafaith disputes concerning doctrine); *Serbian E. Orthodox Diocese*, 426 U.S. at 714–15 n.8 (noting that civil judges are not competent to apply religious law); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871) (“It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of [church] bodies as the ablest men in each are in reference to their own.”).

<sup>200</sup> See Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 *Notre Dame L. Rev.* 865, 869–70 (2009); Garnett, *supra* note 198, at 858.

<sup>201</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (“The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice . . .”).

<sup>202</sup> Garnett, *supra* note 198, at 861.

have some doubts—I can say that they do not apply comfortably to all suits by all nonbelievers. Regarding (1) rationality and (2) judicial competence, two rationales that often work together, it is significant that certain claims that exemptions are required by nonbelief will not involve the sort of nonrational impulses that ostensibly characterize traditional religions and that courts disclaim the competence to assess. Eisgruber and Sager once said that nonbelievers and state officials “in principle share a common epistemic foundation.”<sup>203</sup> Regardless of whether that is true, some nonbelievers do themselves disavow nonrational impulses, and that admission removes one obstacle to judicial inquiry into the connection between a claim and a central tenet of atheism or agnosticism. Humanists like Dawkins, for example, may well argue that moral impulses like pacifism or vegetarianism can be accounted for by evolutionary biology in a way that supports their status as imperatives for action.

Of course, judges may want to independently assess whether a tie to nonbelief is actually as rationally accessible as the adherent claims it is. Where the question is close, they may want to steer clear of even deciding whether a claim is accessible enough to adjudicate. But again, to the extent that nonbelievers plausibly ground their entire system of thought in accessible reasons, courts may have greater power to interrogate a particular claim that conduct is required by that system.<sup>204</sup>

Not every nonbeliever is as avowedly rationalistic as Dawkins—many surely do rely on impulses or commitments that are not ac-

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<sup>203</sup> Eisgruber & Sager, *supra* note 129, at 1293 (“With secular claims of conscience, . . . the believer and the state in principle share a common epistemic foundation.”). They are speaking here of all conscience, but their point pertains to claims by nonbelievers that prohibited practices are demanded by nonbelief. Cf. Laycock, *supra* note 182, at 171 (“On the whole, nonbelievers take their morality from the same modern milieu that drives democratic decision making and government regulation.”).

More recently, Eisgruber and Sager seem to have moved away from the epistemology-based defense of the hands-off doctrine and have instead embraced a disestablishment rationale. See Eisgruber & Sager, *supra* note 136, at 812–13. I am grateful to Micah Schwartzman for pointing out this shift in their thinking.

<sup>204</sup> “Rational” has different meanings in the literature on this question. Here, I sidestep these distinctions and use the word to describe a form of thinking and talking that courts may use without triggering any serious controversy (whether over faith-based reasoning, over engaging in value judgments, or over privileging a particular comprehensive commitment in a liberal society). Judges will count as rational all claims that everyone can agree are accessible to all people. Elements of traditional religions may be rational in this regard, and elements of nonbelief may not be.

cessible to all.<sup>205</sup> And where they do, courts will properly defer. In fact, judges currently yield to groups' interpretations of their own values in comparable secular situations. In the Boy Scouts case, for instance, the Court inquired only "to a limited extent" into the connection between the Scouts' expressive purposes and their claimed need to exclude gay men from scoutmaster positions.<sup>206</sup> Similarly, nonbelieving actors who claim exemptions for conduct that is based on felt impulses or commitments will benefit from judicial deference. Robust atheists who simply believe that there is no such thing as supernatural beings or forces, and who further believe that commands of action or inaction follow from their nonbelief, will receive comparable judicial deference. But where nonbelievers plausibly admit a solely rational connection between particular practices and their foundational commitments, courts should feel freer to interrogate that connection than they do in traditional exemption cases.

Regarding (3), the concern that harm to nonbelief might follow from judicial examination of exemption claims, it is important to recognize that nonbelievers would only risk harm to the same degree that obviously secular institutions of civil society suffer from court intrusion. Courts are less hands-off toward groups like the Boy Scouts than they are toward religious congregations—they investigate their exemption claims "to a limited extent"<sup>207</sup> whereas they defer to religious claims almost completely. While in theory this difference could incentivize nonbelievers to make claims that seem less susceptible to judicial examination—perhaps because they are grounded in inaccessible value commitments—in practice that would require a pretty sophisticated *ex ante* understanding of legal doctrine that ordinary nonbelievers are not likely to have.

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<sup>205</sup> I do not subscribe to the common but wrongheaded juxtaposition of faith and reason, according to which religious beliefs are inherently or always nonrational, while atheist and agnostic commitments never are. My point is narrower: whereas one common justification for the hands-off doctrine has been that believers' claims that conduct is religiously required are not subject to rational evaluation and therefore not suitable for judicial scrutiny, wherever nonbelievers plausibly admit that the connection between their core commitments and particular conduct is purely a rational matter that anyone can evaluate, courts have greater latitude to question whether someone's nonbelief really requires a free-exercise exemption from a general law.

<sup>206</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000).

<sup>207</sup> *Id.* at 650–51 (writing that "it is not the role of the courts" to reject a group's values because they are irrational or inconsistent).

And courts so far have not worried too much that the greater deference they extend to exemption claims by traditional believers will push all expressive associations to claim a religious grounding for their exemption claims. Consequently, worrisome harm to non-believers is not likely to result.

Finally, on (4) and (5), American political authorities have not historically carved out the same zone of privacy or jurisdictional autonomy for secular practitioners and organizations that they have for conventional believers and their congregations. Put differently, there is no long American tradition of a separation of nonbelief and state.<sup>208</sup> That difference may be historically contingent, but it is nevertheless persistent. While some of the American history toward nonbelievers is discriminatory and unworthy of legal respect, the longstanding distinction between religious and obviously secular associations seems free of bigotry—and there is no apparent reason why courts cannot differentiate between objectionable and unobjectionable aspects of that tradition.<sup>209</sup> If, however, judicial scrutiny of nonbelievers' claims came to be directed by antipathy toward atheists or agnostics, that would be a reason to hew even more closely to a hands-off approach that is quite similar to the familiar one for recognizable religions.

In short, one legitimate distinction between nonbelievers and traditional religious observers is that courts may have greater latitude to question at least certain claims that practices are demanded by nonbelief itself and therefore are eligible for free-exercise exemptions. Some courts are already applying just this sort of skepticism. For example, Judge Wood refused to credit an inmate's claim that weekly study groups were essential to the practice of his atheism.<sup>210</sup> This brings claims by nonbelievers into line with claims by

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<sup>208</sup> I am grateful to Douglas Laycock for suggesting this formulation, with which he nevertheless may well disagree.

<sup>209</sup> Some nonbelievers may view this difference in treatment as simple discrimination, and they may point out that tradition alone could not justify disadvantageous government behavior toward other minorities—nonwhite people, for instance, or gay men and lesbians. My response is that while antagonistic discrimination toward nonbelievers is unconstitutional, even though it may be longstanding and widespread, there are certain distinctions between religious actors and others that are not based in that type of antipathy and that courts may take into account. Not every American intuition that believers and nonbelievers are differently situated is driven by a discriminatory purpose and lacks a justifiable basis.

<sup>210</sup> *Kaufman v. McCaughtry*, 419 F.3d 678, 683 (7th Cir. 2005).

people with deeply held secular commitments, at least in this respect. Assertions by nonbelievers should be examined in much the same way. Yet it is important to reiterate that where nonbelievers do object to regulations because of convictions that are in fact integral to their nonbelief—something that is increasingly possible to imagine—then courts should give their exemption claims equal weight and careful consideration, under both constitutional and statutory religious freedom provisions.

My approach to the problem of exemptions for nonbelievers differs from those of both Laycock and Greenawalt. It shares Laycock's general commitment to evenhandedness, agreeing that many nonbelievers will be eligible for presumptive relief from general laws.<sup>211</sup> Yet at certain points it resists the conclusion that nonbelief should be treated in exactly the same way as religion. With regard to exemptions, it gives courts room to more closely examine whether exemption claims by certain nonbelievers concern conduct that is integral to their nonbelief.<sup>212</sup>

Greenawalt's argument contains an ambiguity that makes it slightly more difficult to assess. On the one hand, he seems to suggest that nonbelievers should not enjoy exemptions, even for practices required by nonbelief as such. "Unless atheism is a religion," he says, "atheists do not have free exercise rights that are equal in all respects with those of religious believers."<sup>213</sup> Someone who believed that compulsory school attendance after the eighth grade conflicted with his or her atheism, for example, would not necessarily win the same sort of free exercise protection that was extended in *Yoder*.<sup>214</sup> For him, exemptions should not all be treated in the same way, and the principles of equality that govern may allow

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<sup>211</sup> Laycock, *supra* note 1, at 335–36; cf. Laycock, *supra* note 182, at 170–71 (arguing that exemptions should only be extended to nonbelievers who hold their convictions with "religious intensity").

<sup>212</sup> So while Laycock rightly says that government "should not decree that anyone who crosses the line [between belief and nonbelief] forfeits his right to conscientious objection and loses protection for his deepest moral commitments," there is a difference in *how* courts look at exemption claims by theists and some atheists—a difference that reflects the different epistemology of at least some forms of nonbelief, as well as the peculiar place of religion as such in American legal, political, and social traditions. Laycock, *supra* note 1, at 336.

<sup>213</sup> 1 Greenawalt, *supra* note 1, at 150.

<sup>214</sup> *Id.* Greenawalt does say that they would receive conscience-based protection, but again I leave that more complicated issue to one side here.

courts to extend some relief only to believers.<sup>215</sup> On the other hand, Greenawalt *may* be relying on the assumption that few commands or prohibitions on action will flow from nonbelief itself. In the schooling example, for instance, he emphasizes that public education after the eighth grade is not religious—the implication being that any objection to it must be independent of atheism.<sup>216</sup> So, it is difficult to tell whether he is addressing exemption claims that flow from nonbelief as such.

Either way, my position is distinct from his. If Greenawalt thinks that nonbelievers will seldom claim exemptions for practices that flow directly from their core beliefs, but that when they do make such claims they should enjoy the same protections as ordinary believers, I differ in two ways: I believe it is becoming easier to imagine such claims, and I think courts should not defer to every one of them quite as readily as they do to familiar religious exemption claims. And if he is arguing that even practices that are indisputably connected to nonbelief deserve some lower level of protection, I think it is difficult to justify weaker protection in those few situations where practices are found to be demanded by nonbelief itself and therefore the analogy to core religion cases is strong.

If the law governing exemptions from general laws presents one place where judicial treatment of atheists and agnostics should be somewhat distinct from that of familiar theists, doctrine concerning church autonomy provides another example.

### *C. Church Autonomy*

An interesting and increasingly important area of religious freedom law preserves the autonomy of religious institutions with respect to the government. This law differs from standard free exercise and nonestablishment doctrine in significant respects, and it has generated interest among scholars.<sup>217</sup> To what degree is it spe-

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<sup>215</sup> Id. at 151.

<sup>216</sup> Id. at 150. On the other hand, he does imagine that requiring everyone to attend high school could be “at odds with someone’s atheism,” and he allows that their objection to truancy laws could somehow flow from nonbelief itself.

<sup>217</sup> See Richard W. Garnett, *Religious Liberty, Church Autonomy, and the Structure of Freedom*, in *Christianity and Human Rights: an Introduction* 267 (John Witte, Jr. & Frank S. Alexander eds., 2010); Mark DeWolfe Howe, *Foreword: Political Theory and the Nature of Liberty*, 67 Harv. L. Rev. 91, 94 (1953); Richard W. Garnett, *Do*

cific to religious institutions, as opposed to organizations of nonbelievers? My answer is that the best justifications for the church autonomy doctrine—assuming that good reasons exist<sup>218</sup>—apply more weakly to at least some organizations of nonbelievers.

Central to the church autonomy doctrine is the “ministerial exemption” or “ministerial exception” to employment laws.<sup>219</sup> Courts have held that church employers need not observe antidiscrimination laws when they make decisions regarding the employment

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Churches Matter? Towards an Institutional Understanding of the Religion Clauses, 53 Vill. L. Rev. 273, 274 (2008); Paul Horwitz, Churches as First Amendment Institutions: Of Sovereignty and Spheres, 44 Harv. C.R.-C.L. L. Rev. 79, 83–84 (2009); Ira C. Lupu & Robert W. Tuttle, *Secular Government, Religious People* 1–3 (unpublished book manuscript, on file with the Virginia Law Review Association).

<sup>218</sup> I assume here that there are good reasons for the church autonomy doctrine in its current form. My concern is the relative legal status of nonbelievers. If it turns out that the existence or extent of the doctrine cannot be sustained even for religious groups, that would only strengthen the conclusion that it should not benefit nonbelieving institutions.

<sup>219</sup> I do not focus on another line of cases that contributes to church autonomy, namely those that govern internecine property disputes. Typically, these cases involve an ownership conflict between a breakaway parish and the larger ecclesial body. Where a congregation is part of a larger denominational organization, with which it is “more or less intimately connected” by internal church government, courts have deferred to the ruling of the highest ecclesial tribunal. *Watson v. Jones*, 80 U.S. 679, 726 (1871); see also *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969) (suggesting a grounding in the “First Amendment”); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107 (1952) (indicating that the rule of deference is grounded in the Free Exercise Clause). This rule has been applied to internecine disputes outside the property context as well. See *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 698 (1976) (prohibiting state courts from intervening in the removal of a bishop by the governing body of a hierarchical church). Later decisions allow state courts to adopt a “neutral principles approach,” under which judges may resolve internal disputes if they can do so in purely secular legal terms, without resorting to theological precepts—otherwise, courts defer to the determination of the highest ecclesial authority. *Jones v. Wolf*, 443 U.S. 595, 602–03 (1979).

Other sorts of cases arguably could be included in the church autonomy category as well. For example, courts reject claims based on “clergy malpractice” on the ground that judges lack the competence to “articulate and apply objective standards of care for the communicative content of clergy counseling.” Horwitz, *supra* note 217, at 123 (internal quotation marks omitted). Finally, although religious organizations are exempt from taxation only alongside other nonprofit organizations, see *Walz v. Tax Comm’n*, 397 U.S. 664, 680 (1970) (upholding the exemption against an Establishment Clause challenge), they do enjoy special tax benefits as a statutory matter. In particular, churches are exempt from onerous procedural requirements that other nonprofit organizations must meet. See 26 U.S.C. § 6033(a)(3) (2006) (exempting churches from ordinary tax return filing requirements).



status of ministers and other religious leaders.<sup>220</sup> Remarkably, the exemption applies not only where an employment decision depends on the interpretation of religious doctrine—say, a theological determination that women should not be hired as Roman Catholic priests—but even where an adverse employment decision is taken for purely non-theological reasons.<sup>221</sup> In fact, almost every case has involved a church that disavowed discrimination and purported to be acting on other grounds, such as poor performance.<sup>222</sup> And even in those cases, courts have refused to get involved. This wide scope makes the ministerial exemption more powerful than the protection from antidiscrimination laws that secular expressive associations receive, because it works even where the church makes no attempt to show that its discrimination is demanded by its core beliefs.<sup>223</sup> Moreover, its very existence today is notable, because the Court's decision in *Employment Division v. Smith* purported to eliminate free-exercise relief from general laws, presumably including antidiscrimination statutes that apply evenhandedly to religious and nonreligious employers.<sup>224</sup> And yet

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<sup>220</sup> Antidiscrimination statutes themselves often exempt religious employers from bans on discrimination on the basis of religion. See, e.g., 42 U.S.C. § 2000e-1(a) (2006) (Title VII). The ministerial exemption doctrine also allows them to select clergy on other grounds, such as sex or gender. For a general discussion and critique, see Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *Fordham L. Rev.* 1965 (2007).

<sup>221</sup> For citations, see *supra* note 146.

<sup>222</sup> Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 *Geo. J.L. & Pub. Pol'y* 119, 127–28 (2009).

<sup>223</sup> For further discussion of the special protections that religious organizations enjoy, as compared to secular voluntary associations, see *supra* Section II.C.

<sup>224</sup> Some resolve this tension by arguing that the exemption is rooted in the Establishment Clause. See Lupu & Tuttle, *supra* note 222, at 122–23. Another way out is to note that the *Smith* Court itself cited general church autonomy decisions approvingly. 494 U.S. 872, 877 (1990). Dicta in an earlier case, not overruled by *Smith*, arguably supports the exemption as well. See *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (“[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious.”). For an argument that *Smith* actually provides support for the broad understanding of the ministerial exemption, because it supports a conception of religious freedom for the individual that presupposes and requires the support of a religious community, see Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 *BYU L. Rev.* 1633, 1636, 1677–79.

the ministerial exemption rule has persisted after *Smith*.<sup>225</sup> A final feature is that the exemption is a creature of lower courts, although it almost certainly would be embraced by a majority of justices serving on the current Supreme Court.<sup>226</sup> Together with related doctrines governing church property and other matters, the ministerial exemption articulates a type of special protection for religious organizations that could be called institutional, jurisdictional, or structural.

It is not clear that nonbelievers ought to enjoy a ministerial exemption. To see this, consider the doctrine's justifications. First, the Court has said that judges are incompetent to adjudicate religious questions—in part because those questions are not susceptible to rational resolution—and therefore courts should defer to religious authorities on whether a candidate or employee conforms to theological teachings.<sup>227</sup> For example, an official should not question the claim of orthodox Jews or Roman Catholics that only women may serve as clergy for reasons rooted in scripture and theology. But that reasoning applies somewhat more weakly to nonbelievers. After all, certain nonbelievers adhere only to principles that are fully accessible to outsiders—in fact, limiting themselves to rationality is close to the whole point for these particular types of skeptics.<sup>228</sup> To the degree that judicial deference depends on considerations of rationality and competence, it does not apply perfectly to every type of nonbeliever.

A second justification explains situations where a religious employer does not explicitly discriminate on religious grounds (it may

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<sup>225</sup> For a recent example, see *Alcazar v. Corp. of the Catholic Archbishop*, 627 F.3d 1288 (9th Cir. 2010) (en banc). The ministerial exemption likely has constitutional status, though some courts have grounded it in employment discrimination statutes. See, e.g., *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008). Some courts have refused to extend it to cases of sexual harassment. See, e.g., *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 969 (9th Cir. 2004).

<sup>226</sup> The Supreme Court will soon have an opportunity to pass on the ministerial exemption. See *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 597 F.3d 769 (6th Cir. 2010), cert. granted, 131 S. Ct. 1783 (2011).

<sup>227</sup> *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871). Horwitz argues that to even allow courts to determine *whether* an employment decision is made for religious reasons would involve them in determinations for which “the government lacks the data of judgment.” Horwitz, *supra* note 217, at 119 (quoting Abraham Kuyper).

<sup>228</sup> This is similar to the point that I made in the last section with respect to the “hands-off” rule for free-exercise exemptions.

even disavow such bias), but takes an adverse employment decision for other reasons, such as poor job performance. An employee might charge that the stated reason, inadequate performance, was a pretext for illegal discrimination. One reason to defer to the congregation is that officials cannot capably or fairly figure out whether a clergyperson was performing well spiritually. Doing so is not only beyond their abilities, but could involve favoring one denomination's sense of spiritual qualifications over another's.<sup>229</sup> Interestingly, this rationale does not extend to plainly secular associations—courts do not hesitate to investigate claims of pretext against them, even where the group is organized around deeply held values. My sense is that at least some organizations of nonbelievers will more closely resemble secular voluntary associations in this regard: investigating a claim of pretext will not involve incompetence or impermissible bias. Their assertions that they took action against a leader on nondiscriminatory grounds can be evaluated by courts and other administrators competently and without communicating an official view that amounts to an establishment. In other cases, however, courts may not be able to say fairly whether a particular leader was, for example, sufficiently committed to the nonexistence of God or a particular version of skepticism about the supernatural, and in those cases judges could suspend employment laws.

A third reason is that it would be inappropriate for government to interfere with the intimate relationship between a congregation and its clergy. Government simply should not insert itself into that connection, even to investigate whether illegal discrimination occurred, because doing so may well fray the essential bond of trust between clergy and flock.<sup>230</sup> This too is a reason for state officials to stay out of an employment decision, including in cases where there is no claim that the decision was taken for explicit theological or doctrinal reasons. And yet here as well, secular voluntary organizations do not enjoy the same insulation absent some claim that expressive commitments drove the organization to discriminate (and even then the level of protection is different, as I have shown).

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<sup>229</sup> See 1 Greenawalt, *supra* note 1, at 380; Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 *Vill. L. Rev.* 37, 91–92 (2002).

<sup>230</sup> See *Petruska v. Gannon Univ.*, 462 F.3d 294, 306–07 (3d Cir. 2006).

Some number of nonbeliever congregations have relationships with their leaders that are closer to the ordinary voluntary associations, in the sense that only the ordinary sense of loyalty exists between employer and employee, and not the more profound spiritual bond that current doctrine seeks to shield from government intervention.

In sum, courts should hesitate to extend the ministerial exemption to every organization of nonbelievers. Factors that they might consider include:

- Whether the organization justifies the employment decision on grounds that are integral to its core value commitments, about which courts may lack competence, or whether it gives reasons that are accessible and subject to judicial evaluation;
- Whether investigating a claim of pretext will require courts to favor some commitments over others in a way that amounts to an establishment—for example, assessing a leader's views in a way that endorses a particular variety of nonbelief;
- Whether the community has a relationship with its leader that is profound in the way that a spiritual connection is, or whether its leader provides guidance that is more similar to that found in an secular voluntary association.

Considerations like these can isolate differences between a particular nonbelieving organization and the typical church that speak to the justifications that underlie the ministerial exemption. If they do, then courts should hesitate to suspend employment laws.

Without more, however, this approach may be somewhat unsatisfying. Why exactly should recognizable religious sects enjoy greater institutional autonomy than do ordinary secular associations, and why are some groups of nonbelievers closer to the latter? The best response draws on the peculiar place of familiar religions in American history and traditions. According to this way of thinking, a longstanding custom in western politics differentiates the church from government, so that each enjoys institutional, structural, or even jurisdictional autonomy within a realm. Different scholars have traced this idea through different lines of inheritance all the way up through American constitutionalism, noting

significant alternations along the way.<sup>231</sup> They have argued that the idea of congregational autonomy or sovereignty has influenced doctrines concerning ministerial exemptions and church property at the very least, if not religious freedom law more generally.<sup>232</sup> The idea here is that churches traditionally have occupied a sphere of activity in which government should not have a say.

Two features of this inheritance cast doubt on whether it applies to nonbelievers and their institutions. First, the original rationales for the institutional or structural approach were often themselves religious or theological.<sup>233</sup> If theological grounds for church autonomy still drive the doctrine today—as they arguably do, if only implicitly—those reasons are not available to nonbelievers who wish to argue for a similar measure of institutional autonomy.

Second, much of the intellectual and political history supporting church autonomy is specific to recognizable forms of American religion. Throughout the nation's history, people have treated religious institutions as structurally distinct—including in clergy employment.<sup>234</sup> This may not be principled, but it may nevertheless comprise a fixed and unobjectionable feature of American social meanings and political practices.<sup>235</sup> Nothing as strong as the ministerial exemption applies to secular voluntary associations, for instance, even though some of them enjoy a more limited form of

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<sup>231</sup> See, e.g., Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 *BYU L. Rev.* 1385, 1392; Garnett, *Do Churches Matter?*, *supra* note 217, at 295 (focusing on the Roman Catholic idea of *libertas ecclesiae*, especially as articulated by John Courtney Murray); Horwitz, *supra* note 217, at 83–84, 100–01 (tracing the idea through Abraham Kuyper, the American Puritans, and others); Douglas Laycock, *Church Autonomy Revisited*, 7 *Geo. J.L. & Pub. Pol'y* 253, 258 (2009) (emphasizing historical arguments); McConnell, *supra* note 129, at 17 (tracing the idea of separate spheres for church and state from Luther and Calvin, through Isaac Backus and John Locke, to Jefferson).

<sup>232</sup> Garnett, *supra* note 198, at 848–49; Horwitz, *supra* note 217, at 115–23.

<sup>233</sup> Horwitz, *supra* note 217, at 94–95.

<sup>234</sup> See McConnell, *supra* note 129, at 21–22 (“The special character of religion within the ranks of ‘civil society’ institutions is based, in large part, on Western historical experience.”).

<sup>235</sup> See *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728–29 (1871) (“[In this country, the] right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.”).

protection against antidiscrimination laws under existing First Amendment principles.<sup>236</sup> And few people would push to erase that distinction and allow all secular voluntary associations the full degree of latitude in hiring that churches and synagogues enjoy.<sup>237</sup> Why should an ordinary charity be able to reject all women applicants for its leadership positions, for example, even when it admits that gender discrimination is in no way integral to its key tenets? And yet that is exactly the sort of autonomy that virtually every circuit has extended to religious groups. Push against it as we might, there seems to be something distinctive in the way that Americans have long treated religious organizations in actual political and legal practice.<sup>238</sup>

Should atheist and agnostic organizations be treated more like churches in this scheme or more like secular voluntary organizations? My approach above holds that it would be inappropriate to extend the ministerial exemption to every organization of nonbelievers so that they all would be able to employ their leaders free of antidiscrimination concerns. Whether that is because courts are more competent to assess atheist motivations for employment decisions, or whether it is because they can do so without assessing spiritual qualifications, or whether it is because they can do so without interfering with anything like the special relationship between congregations and clergy, or whether it is because there is an underlying American conception of church autonomy that has customarily been limited to recognizable denominations—in any

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<sup>236</sup> See *supra* Section II.C.

<sup>237</sup> Nor would proponents of church autonomy necessarily wish it to be unified with the law of expressive associations. See, e.g., Richard W. Garnett, *The Freedom of the Church*, 4 J. Cath. Soc. Thought 59, Notre Dame Legal Studies Research Paper No. 06-12, at 18 (2007), available at <http://ssrn.com/abstract=916336> (“[I]t would seem crucial to the success of any proposed translation or incorporation of the *libertas ecclesiae* principle into our law that churches *not* be assimilated and reduced to such [voluntary] associations.”) [hereinafter Garnett, *Freedom*]; see also Garnett, *supra* note 217, at 288 (“Religious institutions are more than voluntary associations with a cause.”) (alterations and quotation marks omitted); Garnett, *Freedom*, *supra* at 23 (“[I]n the end, the freedom of ‘expressive association’ is not enough. . . . because the claims at the heart of the *libertas ecclesiae* principle are, for lack of a better word, ‘bigger’ than those animating the free-speech cases.”).

<sup>238</sup> Eisgruber & Sager, *supra* note 46, at 62 (“[M]ost people—including many who lament these discriminatory practices—believe that church policies about clergy should be constitutionally exempt from anti-discrimination statutes.”).

event, the rule will not be available to every organization of nonbelievers. Many skeptics have working relationships with their leaders that are close to those of ordinary secular nonprofits. It would be hard to justify extending full congregational autonomy to them but not to indisputably secular voluntary associations.

Of course, this is a contestable conclusion—some will challenge it. Yet it is more important to win agreement on the method of reaching it: a multifaceted analysis that leaves room for courts to sensibly find that nonbelievers are similarly situated to familiar sects only in some settings. The next Section considers nonestablishment, another area where judges may sensibly distinguish between nonbelievers and familiar religious practitioners.

#### *D. Nonestablishment*

Laycock raises the unhappy prospect of an established atheism along the lines of the Soviet Union, and he argues that “[t]he only sensible interpretation is that this would be an establishment of religion—an establishment of a certain set of views about religion, of a certain set of answers to the fundamental religious questions.”<sup>239</sup> Is that right? In this Section, I address both government endorsement and public funding, and I argue that although Laycock’s view reflects an important value, state support for nonbelievers may be permissible in at least some situations.

#### *I. Government Expression*

Imagine that a progressive local government—say, in Vermont or northern California—erected a sign in the town square that declared “Good Without God” (an atheist slogan).<sup>240</sup> This scenario is politically unlikely but perhaps not completely outside the realm of possibility.<sup>241</sup>

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<sup>239</sup> Laycock, *supra* note 1, at 330.

<sup>240</sup> Or think of a town that erects a winter solstice display during the holiday season, without displaying other seasonal symbols. Cf. *Wells v. City of Denver*, 257 F.3d 1132, 1153 (10th Cir. 2001) (turning away an atheist’s challenge to a municipality’s refusal to include a winter solstice symbol in its holiday display).

<sup>241</sup> Friends from Vermont tell me that this is conceivable. Cf. *Linnemeir v. Bd. of Trs.*, 260 F.3d 757, 759 (7th Cir. 2001) (remarking that a state university could not adopt a policy of promoting atheism).

To my mind, it presents a close question for constitutional law. On the one hand, it could be argued that this municipal policy cuts against the longstanding American value, iterated in the case law, of government neutrality on questions of faith. Signs that endorse atheism impermissibly take positions on core religious matters, according to this view.<sup>242</sup> Moreover, a local government that favors atheism also implicitly disfavors theism, and it thereby risks relegating traditional theists to second-class status within the political community in that city or town.<sup>243</sup> Even avowed atheists might agree that the Establishment Clause prohibits a town policy that favors their position.<sup>244</sup> They may see this as the flip side of the constitutional principle that ought to prohibit the national motto, “In God We Trust.”<sup>245</sup> For separationists like them, a town’s endorsement of atheism would be prohibited, whether under an understanding of nonestablishment that features neutrality or under one that features equal citizenship.

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<sup>242</sup> 1 Greenawalt, *supra* note 1, at 151 (“Every government sponsorship of the truth of atheism, like every sponsorship of positive religious views, can be treated as forbidden. It should be so treated.”).

<sup>243</sup> See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community . . .”). From time to time, courts have commented in dicta that an effort to cleanse the public sphere of references to religion could constitute an “establishment” of atheism—something they have assumed would be unconstitutional. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 598 (1992); *Newdow v. Roberts*, 603 F.3d 1002, 1016 (D.C. Cir. 2010) (noting the argument that “stripping government ceremonies of any references to God or religious expression would reflect unwarranted hostility to religion and would, in effect, ‘establish’ atheism”).

<sup>244</sup> When I delivered a lecture at a recent meeting of NYC Atheists, a leading local organization of nonbelievers, I posed this hypothetical and asked the audience whether a town policy endorsing atheism ought to be constitutional. It was interesting to me, though not dispositive, that a large majority of attendees thought the atheist display would be unconstitutional. Agreement on this point fell short of a consensus, however.

<sup>245</sup> Even people who think the national motto is permissible might oppose the atheist sign. A special history supports the federal government’s association with the phrase, and that history blunts its impact. See *McCreary County v. ACLU*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) (“[T]he Establishment Clause permits [the] disregard of . . . devout atheists.”). On similar grounds, several members of the Supreme Court suggested that the phrase “under God” in the Pledge of Allegiance does not constitute an impermissible endorsement for various reasons, including because such a phrase works mostly to solemnize public places and occasions rather than to alienate nonbelievers. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 31 (2004) (Rehnquist, C.J., concurring in the judgment); *id.* at 36 (O’Connor, J., concurring).



On the other hand, the “Good Without God” sign could be viewed as permissible. It could be allowed under at least four different theories. First, people who think that nonestablishment protects primarily against unequal citizenship might point out that resident believers can take comfort from the knowledge that they form the majority in the nation as a whole and in virtually every state, if not in their particular town.<sup>246</sup> It is difficult to believe that mainstream Christians or Jews living in every such town would always occupy a subordinated political status as a result of the policy. Citizenship is not purely isolated in that way.

Second, people who believe that mild endorsements are constitutional if they fall into a *de minimis* exception to the normal neutrality rule might conclude that believers in my hypothetical are not differently positioned than nonbelievers now are with respect to the myriad mild expressions that currently exist on federal, state, and local levels. Think again of the national motto and the Pledge of Allegiance. If those endorsements fall under an exception to the usual rule of equality or neutrality, a similar sort of exception should cover the “Good Without God” sign as well.<sup>247</sup>

Third, those who understand the Establishment Clause primarily as protection for liberty or autonomy for individuals would take comfort from the fact that the town guarantees full free exercise rights for believers (as we can assume it does).<sup>248</sup> Given the history and place of religion in America, members of mainline denominations are not likely to feel substantially constrained or burdened by the mere presence of a sign endorsing atheism.

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<sup>246</sup> On the role of localism in Establishment Clause cases, see Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 *Emory L.J.* 19, 60–105 (2006); Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 *Sup. Ct. Rev.* 135; Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 *Harv. L. Rev.* 1810 (2004).

<sup>247</sup> Again, some have argued that the Pledge is in fact not religious at all, given its historical context. See *Newdow*, 542 U.S. at 31 (Rehnquist, C.J., concurring in the judgment). They might view a sign like “Good Without God” as more theologically divisive, given its different history. I find this position unconvincing, mostly because the Pledge and similar mild endorsements are in fact viewed as both religious and divisive by leading nonbelievers, such as *Newdow* himself. See generally Corbin, *supra* note 14 (arguing that the constitutionality of mild endorsements ought to be evaluated from the perspective of nonbelievers).

<sup>248</sup> See *Lee*, 505 U.S. at 606 (Kennedy, J.).

Finally, jurisdictional or structural theories of nonestablishment lean heavily on the contingent history of religion in Western nations.<sup>249</sup> Part of what makes these theories effective is their foundation in the traditions of European and American theology and politics. Arguably, that history does not require a similar separation between government and atheism or agnosticism. For instance, people like Dawkins are likely to say that their arguments do not rest on ultimate grounds. If separationist traditions in America turn on a commitment to keeping officials from making or denying transcendent claims—a possible albeit contestable interpretation—then it would be acceptable for them to endorse Dawkins's reasoning. More generally, too, a town's display of the atheist symbol would not seem to present the same sort of entanglement concerns that follow support for recognized churches.<sup>250</sup> Now of course there is a way for jurisdictional theorists to come out the other way: they could point to the fact that science has been an integral part of the conflict between religion and government for almost its entire western history. Yet it is not utterly unimaginable that a jurisdictional or structural approach to nonestablishment would allow this hypothetical town to declare its admiration for atheism or secular humanism.

In sum, there is more to be said for permitting a town's display of an atheist slogan under the Establishment Clause than many might suspect. Whatever the dangers that nonestablishment is designed to avoid, and whatever the values that it promotes, it is conceivable that local endorsement of nonbelief could have low costs under such circumstances. It could even have pragmatic benefits. In particular, allowing local governments freedom of self-determination in this area could do something to blunt the outrage that atheists and agnostics feel toward national and state-level endorsements of mild religiosity. Even if displaying such a slogan is not permissible, as most people probably will think, drawing attention to the modest costs and possible benefits of allowing such ex-

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<sup>249</sup> See, e.g., Lupu & Tuttle, *supra* note 217, at 15–20 (drawing on the history of the Western idea of jurisdictional separation).

<sup>250</sup> I owe this insight to a conversation with Rick Garnett.

pression—regardless of which theory of nonestablishment is at play—may make it somewhat more thinkable.<sup>251</sup>

The debate over government expression matters more (and plays out differently) in the context of public schooling, but it is also harder to imagine nonbelief being favored there. Teaching the truth of atheism or agnosticism as such in primary and secondary schools would be unconstitutional, just as communicating the truth of religious propositions would be. That is so even though endorsing, say, the benefits of democracy is unproblematic. Children are impressionable, and public schools therefore have special obligations and responsibilities. Even arguments for atheism that are carefully grounded in scientific ways of thinking could not be presented to primary and secondary school students without skewing the competition between religious and antireligious perspectives in the wider society. Few will disagree with this conclusion.

Evolutionary theory, of course, is central in some prominent atheist systems and is famously opposed by some religions. Nevertheless, teaching that theory in public schools need not be connected either to belief or nonbelief. Obviously, there are reasons for teaching evolution that most people think are independent of ultimate questions. Therefore, teaching evolutionary biology will not normally raise serious constitutional questions.<sup>252</sup> I say normally because certain contemporary atheists have made the connection between evolution and nonbelief even plainer and more essential to their entire systems of thought.<sup>253</sup> Thus, teaching evolution may now have the incidental effect of advantaging atheism and agnosticism in the curricular struggle with creationism. Although that effect alone is not constitutionally significant, it could become so if it were taught in a way that purposefully promotes nonbelief.<sup>254</sup> And

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<sup>251</sup> Conceivably, this approach could allow some local endorsement of religious expressions, as well, particularly those of minority faiths. See generally Schragger, *supra* note 246, at 1874–92. That topic lies outside the scope of this Article, which concerns only nonbelievers.

<sup>252</sup> See, e.g., *Smith v. Bd. of Sch. Comm'rs*, 827 F.2d 684, 694 (11th Cir. 1987) (holding that use of secular textbooks in public schools did not establish secular humanism, even assuming it was a religion).

<sup>253</sup> See *supra* Section III.B (describing Dawkins's views).

<sup>254</sup> Similarly, forbidding the teaching of evolution is forbidden because, or to the extent that, it rests on religious motivations. *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968) (striking down a prohibition on teaching evolution); 2 Greenawalt, *supra* note 76, at 141.

the popularity of New Atheism makes that a little easier to imagine, perhaps again in a progressive town with a majority of atheist or agnostic citizens.<sup>255</sup>

## 2. Funding

Most constitutional doctrines concerning government funding now require only neutrality between religious organizations and nonreligious ones. Where that is so, nonbelievers may enjoy support to the same degree as churches and secular nonprofit organizations. For example, a voucher program could include schools run by the Society for Ethical Culture, even if children were directly exposed to atheist or agnostic ideas there. If that seems odd, consider the fact that voucher programs may allow parents to use public funds at all religious schools, including ones that include theological instruction.<sup>256</sup> Moreover, a government program of “faith based initiatives” or “charitable choice” could support atheist or humanist social service providers on the same terms as religious ones.

Yet there are some ways in which government cannot support religious entities, even if the funding is perfectly evenhanded. In particular, direct aid—money that flows from the government to religious entities without the intervention of private individual choice—may not go to support religious activities, such as worship, prayer, or religious instruction.<sup>257</sup> That restriction applies not only to schools, but to all religious organizations.<sup>258</sup> Notably, the law concerning direct aid was developed under the strong influence of Justice O’Connor. It therefore represents one important area in which constitutional doctrine may well shift now that she has retired. But for now, at least, there are strict limits on direct aid to religious observance, even if perfect neutrality is observed.

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<sup>255</sup> Of course, it should be perfectly permissible to teach *about* atheism and agnosticism, just as it is to teach about religion and even about theology.

<sup>256</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 643–44 (2002).

<sup>257</sup> *Mitchell v. Helms*, 530 U.S. 793, 857 (2000) (O’Connor, J., concurring in the judgment) (controlling opinion) (adhering “to the rule that we have applied in the context of textbook lending programs: To establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes”).

<sup>258</sup> *Id.* at 843–44 (raising the specter of direct aid to churches, even if on a neutral basis).

Should that restriction on direct aid also prohibit government funding of nonbelievers' "observance"? Reasonable people may answer differently. To the extent that schools run by the Ethical Culture Society (for example) teach a form of nonbelief that is in direct competition with beliefs and practices inculcated by religious schools, the answer might well be yes. Equivalents of all the dangers of direct government support of religious indoctrination could be said to be present, including the three that Justice O'Connor identified: that government could be seen to be endorsing [non]belief and relegating others to a subordinate status; that direct aid used for the advancement of [non]belief is not wholly in control of private individuals; and that allowing direct support of [nonbelievers'] schooling could open the door to direct aid for [nonbelieving] organizations themselves.<sup>259</sup> The obvious assumption behind the last argument is that direct aid to organizations of nonbelievers would be unconstitutional.

Yet it is reasonable to ask whether these justifications for the direct aid rule really do apply forcefully to nonbelievers. Would direct funding of any American Humanist Association schools (alongside unaffiliated ones) really cause religious people to feel like disfavored members of every political community, thereby harming equal citizenship? Conceivably, inclusion of religious schools in a direct aid program could generate such feelings among nonbelievers (or separationists), as Justice O'Connor implied it would.<sup>260</sup> Under contemporary conditions, however, it might be harder to imagine that including schools run by atheists or agnostics in a direct aid program would have that effect—even in a locality where nonbelievers outnumber traditional believers.

Other justifications for the direct aid rule also conceivably might not apply to nonbelievers. Arguments exist on either side, and it is at least possible to imagine that some courts would not think that the ban on direct aid to religious instruction in schools would apply with the same force to neutral support of schools run by secular humanists, for instance.

In sum, I have argued that nonestablishment might allow more room for mild government endorsement of nonbelief than many

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 842–43.

suspect, particularly endorsement by certain small local governments. In schools, however, teaching the truth of atheism or agnosticism ought to be prohibited, just as religious instruction is. Finally, there may be arguments for permitting direct aid to private schools that instruct students in nonbelief, despite the ban on similar aid to religious schools. If these conclusions seem sound, a wholesale approach to the problem of nonbelievers will seem less appropriate even within nonestablishment doctrine, just as it is among broader categories of religious freedom law.

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The picture that emerges from this Part is variegated. Neither treating nonbelievers just like familiar religious people nor rejecting that analogy altogether is satisfactory. Taking into account all the principles and pragmatics involved in each area means that results will vary from rule to rule, as well as from situation to situation. Even people who disagree with one or another of the particular recommendations that I have made may still accept this larger point: nonbelievers cannot sensibly be fit into the mold of religion for all areas of American religious freedom law, nor can they always be excluded from it.

#### CONCLUSION

Considering nonbelievers may suggest an answer to an important contemporary critique. Several scholars have recently argued that the entire project of protecting religious freedom is unsound—in part because of the difficulty of determining the scope of the concept of religion and in part because the persistent uniqueness of religion in American law is indefensible.<sup>261</sup> Courts are striking compromises that they cannot conceptually defend. Yet carefully considering the case of nonbelievers indicates that there may be little cause for worry. While a polyvalent, piecemeal approach may re-

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<sup>261</sup> See, e.g., Sullivan, *supra* note 87, at 8 (“This book . . . is about the impossibility of religious freedom . . . . What is arguably impossible is justly enforcing laws granting persons rights that are defined with respect to their religious beliefs or practices.”); Smith, *supra* note 87, at 1905–06 (arguing that modern secular discourse cannot justify religion’s legal distinctiveness, which nevertheless persists without a satisfying rationale).

quire judgments that are irreducibly complex, the endeavor is not necessarily irrational or erratic. Courts can and do make difficult judgments like the ones required to adjudicate the religious freedom claims of nonbelievers. Whether or not those judgments can be accounted for by a “theory” of religious freedom—assuming for the moment that something significant turns on that label—they may well be reached in a manner that qualifies as both rational and meaningfully legal.